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SUPREME COURT OF THE UNITED STATES.

MARY LOIS McINTOSH,
Petitioner,
vs.
ELLA L. WIGGINS,
Respondent.

No. 915

PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF AND ARGUMENT.

PAUL BAKEWELL, JR.,
St. Louis, Missouri,
Counsel for Petitioner.

With Him on Brief:
JOHN E. CRAMER, JR.,
CLAUDE I. BAKEWELL,
St. Louis, Missouri.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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No. .....

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Mary Lois McIntosh, respectfully petitions this Court to grant a writ of certiorari to review the final decision and judgment of the United States Circuit Court of Appeals for the Eighth Circuit, sitting in Equity, in the case of Mary Lois McIntosh vs. Ella L. Wiggins, 123 Fed. (2d) 316.

The judgment below was rendered October 29, 1941. A dissenting opinion was filed.

A petition for rehearing was denied on November 26, 1941.

A motion to vacate the judgment because of a supervening decision by the Supreme Court of Missouri was denied on January 6, 1942.

Italics throughout are ours.

SUMMARY STATEMENT OF MATTERS INVOLVED.

In 1923 the Supreme Court of Missouri construed the will of John E. Liggett of Missouri on a single issue in a suit filed by his three daughters, that issue being—whether his three daughters had each taken a mere life tenancy, or whether they held absolute estates, which they claimed in property worth several millions of dollars.

The said Supreme Court decided that each had merely a tenancy for her life in one-third (⅓) of the property, and that the estates in remainder—then prospective—were contingent. It directed an affirmance of such a ruling.

Its opinion stated that the testator intended that if a daughter should die without issue her one-third (⅓)

> "shall go to the survivors of my said daughters in equal portions for life, with remainders over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes" (271 S. W., p. 827; Phys. Ex., p. 104).

Thereafter one daughter, Mrs. Fowler, died without issue. The two other daughters, Mrs. Kilpatrick and Mrs. Wiggins, survived her.

On August 10, 1928 Mrs. Kilpatrick died and left two *heirs of her body,* Mary Lois McIntosh, a daughter, Petitioner here, and Elizabeth Liggett Kennard.

They then claimed the equal portion of the Fowler one-third (⅓), being the one-sixth (⅙) interest which, on the death of Mrs. Fowler, had passed to Mrs. Kilpatrick for her life, and which was to vest on her death in the heirs of her body, a one-twelfth (1/12) interest in each.

But a paragraph of the decree of the trial Court, which remains of record, *in the same case,* contradicts the above quoted statement in the opinion of the Supreme Court of Missouri.

Said paragraph of the decree purports to deprive the heirs of the body of Mrs. Kilpatrick of said one-sixth (⅙) interest by purporting that the same one-sixth (⅙) interest should pass to her sister, Mrs. Wiggins (Respondent here) for her life, as successor life tenant, and that the remainder interest therein shall vest hereafter on the death of Mrs. Wiggins and shall then vest in contingent remaindermen who are not now ascertainable.

The two heirs of the body of Mrs. Kilpatrick, Petitioner and Elizabeth Liggett Kennard, claimed the said one-sixth (⅙) under the will and under the opinion of the Supreme Court of Missouri.

Mrs. Wiggins, Respondent, claimed the same one-sixth (⅙) under the decree of the trial Court in the same case, which contradicted the express statement above quoted by the Supreme Court.

Respondent expressly admits that the said one-sixth (1/6) interest passed to Dolly L. Kilpatrick for her life. Respondent expressly admits that Dolly L. Kilpatrick left surviving two "*heirs of her body*", Petitioner and Elizabeth Liggett Kennard (Ans., R., p. 20). But Respondent claims the said one-sixth (1/6) adversely to the two heirs of her sister's body.

Under the will the rights of those two are identical.

In the Courts of Missouri, Elizabeth Liggett Kennard has won her share. In the Federal Courts, the Petitioner has been denied her share.

In a separate but companion suit brought by Elizabeth Liggett Kennard against Mrs. Wiggins in the Courts of Missouri, the Supreme Court of Missouri in 1941 specifically ruled:

> "Hence when Dolly L. Kilpatrick died the ⅙ interest that came to her upon the death of her sister Cora B. Fowler, vested in her daughter, Mary Lois Perry, now Mary Lois McIntosh, and the present plaintiff [Eliza-

beth Liggett Kennard], 1/12 interest in each'' (R., p. 361).

In that case the Supreme Court of Missouri adjudged that Elizabeth Liggett Kennard recover her one-twelfth (1/12) from Mrs. Wiggins. (Opinion of Supreme Court of Missouri, R., p. 356).*

In the *Kennard* case the Supreme Court of Missouri, in 1941, stated that in the original case it had not ruled upon said paragraph of said decree (R., p. 361); that such paragraph was wrong (R., p. 363); and that it had been the result of fraud and that it amounted to a constructive fraud upon the rights of Mrs. Kennard (R., p. 370).

That opinion also sets out the statements and omissions of counsel in the original suit, which were the effective cause of the paragraph of the decree remaining on the record (Opinion of the Supreme Court of Missouri, R., p. 356).

In the *Kennard* case the Supreme Court of Missouri said:

> ''* * * to refuse redress in the present case 'would be a reproach to the administration of justice' '' (R., p. 370).

In this companion case by Mary Lois McIntosh, of Connecticut, against Mrs. Wiggins, of Missouri, brought in the Federal Court by reason of diversity of citizenship, the majority of the Court below accepts the ruling by the Supreme Court of Missouri that under the will the one-twelfth (1/12) interest belongs to Petitioner, but denies her the recovery of the same and permits Mrs. Wiggins to hold it.

A dissenting opinion in the Court below by Circuit Judge

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*On December 16, 1941, the Supreme Court of Missouri overruled a petition for a rehearing.

On December 26, Mrs. Wiggins filed a further petition for a rehearing, and a motion to transfer to the Court in Banc. At the time of writing this the Court has not acted upon the same, but the Rules of that Court prohibit the filing of more than one petition for rehearing. Under the Constitution of Missouri, there is now no ground upon which the cause may be transferred to the Court in Banc.

Johnsen said that the Supreme Court of Missouri had clearly branded the paragraph

> "* * * as unconscionable and as a legal perversion. * * * that a gross injustice has been perpetrated, apparently inadvertently, by an unconscionable decree and one legally indefensible * * *."

It further said:

> "There necessarily is a legitimate clamor for a remedy, as a matter of elemental justice and public respect for the courts" (R., p. 299).

We present this petition for certiorari not only in the interest of Mrs. McIntosh, the other remainderman, whose rights are identical with those of Mrs. Kennard, to whom the Supreme Court of Missouri awarded judgment, but also in the interest of elemental justice and public respect for the Courts as instruments of Justice.

The strange situation in which one paragraph of a decree contradicted the statements in the opinion of the Supreme Court in the same case, but where the Court records contained an order of affirmance, affects the title to real estate in Missouri and has necessarily resulted in much litigation.

A mere statement of the ruling below will not suffice without a reference to such previous litigation. Therefore, such litigation will be briefly described here.

THE ORIGINAL SUIT IN WHICH THE DECREE CONTRADICTED THE STATEMENTS IN THE OPINION.

John E. Liggett had three daughters, Cora B. Fowler, Ella L. Wiggins and Dolly L. Kilpatrick. Under his will each of them held an estate for her life in an undivided one-third (⅓) interest in certain property.

They filed a suit in the Circuit Court of Missouri, referred to in this record as "the will construction suit."

They claimed that each of them owned an absolute estate in one-third (⅓) of the property, as distinguished from a mere tenancy for her life.

They included as defendants in said cause Mary Lois McIntosh and Elizabeth Liggett Kennard, and both were served with summons and a copy of the petition.

Petitioner did not appear, and filed no pleading to the petition by which her mother and her two aunts sought to have adjudicated the issue as to whether each of them took an absolute estate in fee or a mere life estate.

Neither Mrs. Kilpatrick nor Mrs. Wiggins claimed any interest in the Fowler one-third (⅓). On the contrary, they alleged that Mrs. Fowler owned the same absolutely.

The Circuit Court denied the claim of the daughters to absolute estates and ruled that they took life estates only with contingent remainders over to the heirs of their bodies, respectively, and directed counsel to draft a decree.

The decree so drawn covers 57 printed pages (Phys. Ex., p. *223).

In preparing such decree for the Circuit Court, counsel for the guardian ad litem of a minor and counsel for Mrs. Wiggins agreed upon the paragraph written into the decree, which paragraph contradicted the will with regard to the future devolution if a daughter should die without issue (Phys. Ex., p. *522).

On appeal, counsel did not advise the Supreme Court of the presence of said paragraph (R., p. 369) and the Supreme Court later said that the briefs would suggest that "no such construction had been made" and that "no judge, by reading the briefs *would even suspect* that such a construction * * * had been made" (R., p. 366).

Mrs. Wiggins and her two sisters appealed the suit to the Supreme Court of Missouri. That Court said in its opinion:

"The trial court held that the will created life estates

only in the three daughters, with contingent remainders over in their bodily heirs, and *entered a decree accordingly.* From that decree the daughters duly appealed the case to this court, and *the single question they now present is whether that ruling is correct, or not"* (271 S. W., p. 821; Phys. Ex., p. 84).

The Supreme Court decided that *such ruling* had been correct and directed an order of affirmance.

As a reason for its decision the Supreme Court said in its opinion that if a daughter should die without issue, the testator intended her portion

> "shall go to the survivors of my said daughters in equal portions for life, with remainders over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes" (271 S. W., p. 827; Phys. Ex., p. 104).

That opinion was rendered in 1923.

A DAUGHTER DIES WITHOUT ISSUE.

Years later a daughter, Mrs. Fowler, died without issue. Her two sisters survived her. Thereupon an equal portion of the Fowler one-third (⅓), or a one-sixth (⅙) interest, passed to her sister, Dolly L. Kilpatrick, for her life, with remainder over to the heirs of her body.

On August 10, 1928 Dolly L. Kilpatrick died and left two heirs of her body, Petitioner here, and Elizabeth Liggett Kennard.

Under the will and under the opinion of the Supreme Court, each of them took an undivided one-twelfth (1/12) interest absolutely, but Mrs. Wiggins claimed the said entire one-sixth (⅙) interest.

She asserted that the paragraph of the decree of the Circuit Court in the will construction suit gave it to her, and that such decree had been affirmed.

But the paragraph of the decree of the Circuit Court was flatly contrary to the statement in the opinion of the Supreme Court.

AN ACTION TO TRY TITLE TO REAL ESTATE.

Petitioner, under her then name, Mary Lois Perry, filed a suit against Ella L. Wiggins in the Federal Court at St. Louis, which was an action at law to try title to certain real estate.

Petitioner claimed under the will of her grandfather.

Mrs. Wiggins, Respondent here, pleaded as a defense the decree of said Circuit Court of St. Louis in the will construction suit and the order of affirmance by the Supreme Court of Missouri as res adjudicata and as an estoppel.

The Federal Court sustained the said State decree in the will construction suit as valid and binding. It expressly declined to determine the title and based its judgment solely upon the said State decree in the will construction suit.

Its judgment said in part:

> "That the premises considered, the Court holds and adjudges: that as between the parties hereto, the said decree of the Circuit Court, City of St. Louis [in the will construction suit] * * * was and is res adjudicata * * *; that the title, rights and interest of defendant [Ella L. Wiggins, the Respondent here] * * * and of the plaintiff [Mary Lois McIntosh, Petitioner here] are as the same were adjudged to be in the said decree construing said will * * *" (Phys. Ex., p. *538).

On appeal, the Court of Appeals for the Eighth Circuit affirmed that judgment on a matter of procedure (57 Fed. (2d) 622).

In that cause the District Court expressly declined to determine the title under the will (Phys. Ex., p. *532).

The Court of Appeals did not determine the title under the will.

That action at law was ended in 1932.

A MOTION FOR A NUNC PRO TUNC ENTRY IN THE ORIGINAL WILL CONSTRUCTION SUIT.

Thereafter, Petitioner and Mrs. Kennard joined in a motion in the State Court for a nunc pro tunc order correcting the unjust paragraph in the decree in the will construction suit, contending that under the judgment of the Supreme Court of Missouri in said suit the contingent remainders had vested in them in 1928, on the death of Dolly L. Kilpatrick.

The Supreme Court of Missouri then held that in the will construction suit it had not specifically ruled upon the paragraph, which purported to adjudge the devolution of the share of a daughter who might die without issue. *Wiggins v. Perry,* 119 S. W. (2d) 839 (R., p. 73).

A SEPARATE EQUITY SUIT BY ELIZABETH LIGGETT KENNARD.

Then Mrs. Kennard submitted to the State Courts of Missouri her separate action in Equity to recover her one-twelfth (1/12) interest. The opinion of the Supreme Court of Missouri in said cause was rendered in 1941 and establishes:

1) That "in the will construction suit the three daughters [of the testator] had contended that under the will they took a fee interest instead of a life estate" and that in said cause the trial Court had "held that they took a life estate only," and that the future interests were contingent remainders, and that such ruling had been "affirmed" by the Supreme Court of Missouri (R., p. 357).

2) That the decree in said suit had purported to adjudge

the devolution of a future contingent interest if a daughter should die without issue (R., p. 358).

3) That in the will construction suit, the Supreme Court itself had not ruled upon the then prospective devolution of the share of a daughter who might die without issue (R., p. 366).

4) That the proof showed that in the will construction suit counsel had not advised the Supreme Court as to the existence of said paragraph in the decree, but that to the contrary the briefs of all counsel had stated:

> "the intention of the testator to be that if a daughter should die without issue, her one-third (⅓) should pass in equal portions to her surviving sisters for life, with remainders over to the heirs of their respective bodies" (R., p. 370).

(The opinion quotes such statements as made by each of said counsel, including counsel for Respondent here. R., pp. 364-5.)

5) "That no judge, by reading the briefs in the will construction suit appeal, would even suspect such a construction as that contained in the paragraph of the decree" (R., p. 366).

6) That "the briefs [in said suit] would suggest that no such construction was [had been] made" (R., p. 366).

7) That "no point was [had been] made as to the correctness of such construction" (R., p. 366).

8) That the "paragraph was in the will construction suit decree, and that" the Supreme Court itself had "affirmed that decree," but that the "attention" of the Supreme Court had not been "directed" to said paragraph (R., p. 363).

9) That the paragraph of said decree was wrong (R., p. 361).

10) That it was not "tenable" and that "no word juggling as to remainders" could "in reason reach such result" (R., p. 363).

11) That the challenged paragraph had been the result of fraud and that "under the facts" the challenged paragraph "amounted to a constructive fraud upon the rights" of Mrs. Kennard, and by such fraud the Court meant "representations which cause injury to another, although the party making the representations did not intend to deceive" (R., p. 370).

12) That under the will the one-sixth (1/6) interest here involved, which had passed to Dolly L. Kilpatrick for her life had, upon her death, vested absolutely in Mary Lois McIntosh, Petitioner here, and in Elizabeth Liggett Kennard, a one-twelfth (1/12) interest in each (R., p. 361).

13) That Elizabeth Liggett Kennard should recover her property, together with all income derived therefrom since August 10, 1928 (R., p. 371).

A SEPARATE EQUITY SUIT BY MARY LOIS McINTOSH.

The instant case in Equity by Mary Lois McIntosh, a resident of Connecticut, against Mrs. Wiggins, a resident of Missouri, was in the Federal Court because of the diversity of citizenship and was submitted upon the same documentary proof as was used in the *Kennard* case—the printed record and briefs in the will construction suit.

THE MAJORITY OPINION BELOW.

In direct conflict with the decision of the Supreme Court of Missouri and disregarding the express Findings of Fact and Conclusions of Law expressed by the Supreme Court

of Missouri, the majority of the Court below ruled that the paragraph in the decree in the will construction suit was valid and binding.

The majority below accept the ruling by the Supreme Court of Missouri that the decree was wrong, and therefore admit that Petitioner in 1928 became the owner of the property sued for.

But sitting in Equity, the majority below give to Respondent full benefit of a State decree, which the State law has adjudged to be wrong, and to have resulted from fraud.

The majority below said in its opinion:

> "it is to be noted that that court [the Supreme Court of Missouri] does not hold that it [the decree] was procured by fraud, accident or mistake, * * * (R., p. 298).

That opinion was rendered October 29, 1941.

On December 16, 1941 the Supreme Court of Missouri, of its own motion, modified its opinion in the *Kennard* case and stated:

> "However, as we see it, the challenged paragraph in the will construction suit, under the facts, amounted to a constructive *fraud* upon the rights of the present plaintiff, a minor defendant in that suit. And by such fraud, we mean representations which cause injury to another, although the party making the representations did not intend to deceive" (R., p. 370).

Petitioner informed the Court below of such explicit ruling subsequently made and moved the Court below to vacate its judgment (R., p. 347).

On January 6, 1942 the Court below denied said motion and permitted its original opinion to stand (R., p. 372).

The majority of the Court below also ruled that Petitioner is barred, as a matter of res adjudicata, by the

previous decision of the Federal District Court in the action at law hereinbefore described (R., p. 294).

It does so notwithstanding the fact that said judgment was a dependent judgment and rested solely upon the State decree, which subsequently has been invalidated by the highest Court of Missouri, and notwithstanding the fact that since the rendition of such judgment at law, as to a matter of local law, a supervening decision by the Supreme Court of Missouri, in direct relation to the matter, has established the local law and has created a new situation.

The majority opinion said:

> "The decision of the Supreme Court of Missouri cannot, in any event, affect in any way the binding force and effect of the judgment of the United States District Court in Perry vs. Wiggins, which this court has affirmed (57 F. 2d 622) and which it may not now ignore. See and compare Deposit Bank vs. Frankfort, 191 U. S. 499" (R., p. 298).

The majority below, as a Court of Equity, gives to Respondent full benefit of a former Federal judgment in an action at law, which judgment is wrong; which does an injustice; and which rests solely upon a paragraph of a State decree, which the highest Court of that State has adjudged to be wrong and has invalidated because of fraud.

The majority opinion below also ruled that Petitioner, an adult at the time of the will construction suit, had not appeared therein and that

> "her own negligence in having failed to appear and defend her rights in that suit was enough to prevent the court below from granting her the relief which she seeks" (R., p. 297).

(We will show in our argument *infra*

a) that under the law of Missouri, Petitioner, at the

time of the will construction suit, had no "rights" which she could have then defended; that she had merely the possibility of acquiring thereafter a contingent interest which was dependent upon contingent events; and that such possibility would not have permitted her to assert any "rights" under the law of Missouri;

b) that under the law of Missouri, Petitioner is entitled to recover; and

c) that in Equity Respondent may not claim the benefits of a decree which is wrong.)

The majority of the Court below ruled:

> "No party and no attorney in that litigation [the will construction suit] owed her [Petitioner] *any* duty with respect to the protection of her *rights*" (R., p. 297).

(We will show in our argument *infra* that such statement tacitly approving the making of erroneous representations by counsel to the Supreme Court of Missouri, which that Court condemned, has so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.)

The majority of the Court below said:

> "the challenged provision of the decree was not questioned in the Supreme Court [of Missouri] by any of the parties to the appeal and *was not an issue on appeal*" (R., p. 296).

The Supreme Court of Missouri has established that in the will construction suit Mr. Kirby, counsel for Mrs. Wiggins, had stated in his brief in the Supreme Court of Missouri the intention of the testator to be that if a daughter should die without issue her one-third (⅓) should pass in equal portions to her surviving sisters for life, with

remainders over to the heirs of their respective bodies (R., pp. 365 and 370) and *had failed to inform the Supreme Court of the paragraph of the decree to the contrary* (R., p. 369).

Mrs. Wiggins did not present to the Supreme Court of Missouri for decision by it the correctness *vel non* of the paragraph of the decree which (in contradiction to the intention of her father's will as stated by her counsel to the Supreme Court) *gave to the surviving daughters successive life estates* (R., p. 24).

The answer filed in the instant case by Mrs. Wiggins through her same counsel expressly avers that Mrs. Wiggins did not wish to have that paragraph *reviewed or altered* (R., p. 33).

Her counsel told the Supreme Court of Missouri that the testator intended the property to go

> "to the survivors of the daughters again with remainders *over to the heirs of their bodies*" (Opinion of the Supreme Court, R., p. 365).

But he did not present to the Supreme Court a paragraph of the decree of the Circuit Court (Opinion of the Supreme Court, R., p. 369) which gave to the survivors of the daughters *successive life estates,* because they did not wish the Supreme Court to review or alter that paragraph (R., p. 366).

Here are the exact words of the answer in this case:

> "inasmuch as the decree of the State Circuit Court had held that if one daughter died without issue, leaving two sisters surviving, the latter would take successive life estates, the daughters (appellants) had no desire to have that provision of said decree reviewed or altered" (R., p. 33).

Notwithstanding those facts, the majority below ruled that because the paragraph had not been questioned in the

Supreme Court and had not been in issue on said appeal, therefore the paragraph, as a part of the decree of the trial Court in the same case, remains valid and binding.

As applied to the facts here, such ruling by the majority below means this: In a suit to construe a will—the sole purpose of which is to give effect to the testator's intention—a paragraph of a decree of the trial Court, which defeats and perverts that intention, is conclusive, because the Appellate Court, which rendered the final judgment in the case, did not rule upon such paragraph, and did not rule upon it because counsel had informed the Appellate Court in their briefs of the true intention of the testator, and had failed to inform that Court that a paragraph of the decree of the trial Court contradicted the testator's true intention as stated by them; and because they had not presented the said paragraph to the Supreme Court, *because they did not wish to have such paragraph reviewed or altered.*

Such ruling was made by the Court below after the Supreme Court of Missouri, which had rendered the final judgment in the will construction suit, had specifically stated:

> "No judge, by reading the briefs in the will construction suit appeal, would even *suspect* such a construction as that contained in the challenged paragraph of the decree" (R., p. 366).

and

> "the briefs would suggest that no such construction was made, * * *" (R., p. 366).

THE DISSENTING OPINION BELOW.

The dissenting opinion below said that the Supreme Court of Missouri had clearly branded the paragraph in the will construction decree "as unconscionable and a legal perversion"; that when Dolly L. Kilpatrick died the one-

sixth (⅙) interest vested in the two heirs of her body; and that the decree to the contrary was indefensible.

It ruled that a gross injustice had been perpetrated; that a legitimate clamor for a remedy followed as a matter of elemental Justice and public respect for the Courts; that the State Courts of Missouri had righted the wrong as to one of the remaindermen, but that the other was being told by the Federal Courts that she was engaged in a futile assault upon the ramparts of res adjudicata; that the paragraph of the decree "had crept into the decree" solely because of a guardian ad litem's pleading and by the insertion of such provision by the attorney for the guardian ad litem in the decree; and that the Supreme Court of Missouri has determined that the act of the guardian ad litem had been in excess of his lawful authority and by mistake of his counsel (R., p. 300).

The minority asked that "the actualities of the situation be dealt with straightforwardly in the interest of elemental justice" (R., p. 301).

The minority opinion below quotes from the Federal judgment in the action at law to try title to real estate and shows that same was dependent upon the State decree, and that plainly it had been simply an adjudication that the rights of the parties had been settled by the prior decree of the Circuit Court of the City of St. Louis, and that a voiding of the latter decree should automatically void the effect of the Federal judgment at law or, at any rate, give the right to declare that judgment nugatory or to allow any pleading amendment necessary to obtain that result (R., p. 301).

QUESTIONS PRESENTED.

1) Whether or not a Federal Court has violated the principle of the finality and supremacy of State decisions as to local law (*Erie R. R. vs. Tompkins,* 304 U. S., p. 78) by holding a decree of a State Court to be res adjudicata,

after the highest Court of that state had ruled that said State decree was wrong, and had specifically decided that such State decree had been the result of fraud and had thereby necessarily and implicitly adjudged such decree to be void?

2) Where, after a Federal decision as to a matter of local law, a supervening decision by the highest State Court in direct relation to the matter creates a new situation and establishes the State law, then whether or not such supervening State decision, as to such local law, should not be given effect by the Federal Court, as opposed to its own prior decision to the contrary with regard to a matter of local law?

3) Whether or not a Federal Court may sustain as res adjudicata a decree of a State Court, which the highest Court of that State has invalidated for fraud?

4) Where in an action at law to determine title to real estate in Missouri, a Federal judgment affirmed by the Court of Appeals for the Eighth Circuit had rested solely upon a decree of a Missouri State Court, and when subsequently the highest Court of Missouri has decided that such basic and underlying State decree had been the result of fraud, and that it had been wrong, then whether or not such decision by the highest Court of Missouri can not affect in any way the Federal judgment, which had rested upon it in a further proceeding between the parties *in the Federal Court, which had rendered the first Federal judgment?*

As a corollary: Whether or not the voiding and vitiation for fraud of such basic and underlying State decree by the highest State Court, does not render nugatory a judgment at law which had been dependent solely upon said State decree and, therefore, require the vacation of the dependent Federal judgment?

5) Whether or not an asserted title to property, which title is founded upon fraud, is not utterly void?

6) Whether or not a Federal Court may give effect to a decree of a State Circuit Court, when such decree appears in a suit filed to give full effect to the intention of the testator, and when such decree defeats the intention of the testator, as stated by the highest Court of the State in the same case in which the decree appears; and whether such a decree is not void as a legal perversion?

7) Whether or not a Federal Court of Equity may hold that a State decree is wrong in that it gives property to one, which property belongs to another; and simultaneously permit such erroneous and unjust decree to shield the one who does not own the property against the claims of the lawful owner thereof?

8) Whether or not a party may be deprived of rights and estates which first vested in her and which she first acquired in 1928, because she did not appear and protect such "rights" in 1923, before she had acquired any rights, when under the law of Missouri such rights could not arise until 1928, and such party had no legal right or standing to contend in Court for any rights prior to the happening of the event which would cause them to arise and vest in her and which event happened in 1928?

9) Whether or not the binding force and effect of a decree in Equity is limited to the matters actually presented to the Appellate Court for decision, and which it intended to decide, and whether in a will construction suit a paragraph of a decree of the trial Court is conclusive, when such paragraph was written by agreement of certain counsel and was not presented to the Appellate Court for decision, and when such paragraph contradicts the intention as stated in the opinion of the Appellate Court and contra-

dicts the intention, as stated to the Appellate Court in the briefs of the very counsel who had caused the paragraph to be inserted, and when the Appellate Court had said that by reading the briefs, no Judge would suspect the presence of such a paragraph in the decree?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I. The direct conflict of decision between the highest Court of Missouri and the Court below, as to a matter of State law, violates the principle of uniformity within a State, established by *Erie R. R. vs. Tompkins,* 304 U. S., pp. 74-77, and defeats the orderly administration of Justice in the relationship of State and Federal Courts.

II. Where, after one Federal decision, *as to a matter of local law,* a supervening decision by the highest State Court in direct relation to the matter creates a new situation and establishes such State law, then such supervening State decree should be given effect by the Federal Court, regardless of its own prior decision to the contrary, *as to a matter of local law. Blair vs. Commissioner,* 300 U. S., p. 9.

III. Where a Federal Court had rested its judgment solely upon a State decree, and an order of affirmance by the highest State Court, and when subsequently the highest State Court has adjudged such decree to have been wrong and has invalidated it because of fraud, the issue as to whether such decision by the highest State Court can not in any event have any effect upon the Federal judgment in the Federal Court which rendered it, is of national importance. This Court has uanimously ruled that under such circumstances the Federal judgment is not an estoppel in the Federal Court, which rendered it. *Deposit Bank vs. Frankfort,* 191 U. S. 499. The Court below has ruled to the contrary.

IV. A clear distinction between

(a) the finality and supremacy of State decisions as to matters of local law; and

(b) the finality and supremacy of Federal decisions as to matters of Federal law

and the method of obtaining the supremacy of each, by each following a supervening decision of the other within the ambit of the jurisdiction and supremacy of such other, as opposed to its own prior decisions on such matters, is of national importance.

V. This Court has granted certiorari in *Gorman, City Treasurer, vs. Washington University,* No. 711. There the question presented, in the light of the supremacy of State decisions, *as to matters of local law,* established by *Erie R. R. vs. Tompkins, is*: whether a State Court has violated that principle by disregarding its own first decision (a State decision) as to local law, and by following a Federal decision—an old decision of this Court—opposed to its own first State decision, as to a matter of local law.

Here the question presented, in the light of said principle, is: whether a Federal Court has violated that principle by disregarding a State decision as to local law, and by following its own former Federal decision, as opposed to a supervening State decision to the contrary, as to local law.

VI. The issue as to the conclusiveness of a Federal judgment, which had rested solely upon a State decree, after such underlying and basic State decree had been invalidated for fraud, by the highest Court of that State, is of national importance.

VII. The Court below sitting in Equity has a) sustained a title asserted by Respondent, which title is founded upon fraud and is, therefore, utterly void because of fraud, under the law as declared by this Court, and b) sitting in Equity, has given to Respondent the benefit of an unjust decree.

VIII. The Court below has sustained as res adjudicata a State decree, after the highest Court of that State has established that such decree had been the result of fraud, and even though the establishment of fraud in obtaining a decree renders it void *ab initio* and, therefore, without any effect as an estoppel.

IX. When the sole foundation of a Federal judgment is a former decree, and when subsequently the former decree has been reversed or set aside, the question whether the dependent judgment, which was based upon it, is not also rendered nugatory, and whether both are not vitiated by the common error is of national importance.

X. The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

XI. The majority decision below conflicts with decisions of other Courts of Appeals and with the prior decisions of the Eighth Circuit itself, and with the decisions of this Court.

Wherefore, your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the decree of the Circuit Court of Appeals for the Eighth Circuit be reversed by this Honorable Court, and your Petitioner have such other and further relief in the premises as to this Honorable Court may seem meet and just.

PAUL BAKEWELL, JR.,
St. Louis, Missouri,
Counsel for Petitioner.

I hereby certify that the foregoing petition, in my opinion, is well founded, and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Paul Bakewell, Jr.,
Counsel for Petitioner.

BRIEF AND ARGUMENT.

ERRORS RELIED UPON.

The majority of the Court below erred:

A.

In ruling in direct conflict with the decision of the highest Court of Missouri as to a matter of local law.

B.

In violating the principle of the finality and supremacy of State decisions as to local law.

C.

In holding that a supervening State decision, which has established fraud in a State decree, and thereby rendered the same void, can not in any event affect the binding force and effect of a Federal judgment, which had rested on said State decree as its sole foundation.

D.

In giving full effect to a State decree after the State Courts had invalidated the same decree because of fraud.

E.

In holding that a decree, which perverts the purpose of the suit in which it appears, is valid and binding in Equity.

F.

In holding that even though a State decree be wrong, nevertheless, a party may have full benefit of such wrong and unjust decree in a Court of Equity.

G.

In holding, contrary to the law of Missouri:

(a) that Petitioner had "rights" at the time of the will construction suit, although life estates were then in existence and the future interests were then contingent, both as to events and as to the parties who will take the same;

(b) that Petitioner had been negligent in failing to protect her "rights" in said will construction suit; and

(c) that such negligence deprived Petitioner of her right to recover property, which did not vest in her until years after the said will construction suit had been determined.

H.

In holding that a matter covered by a provision of a decree of a trial Court in an Equity suit has been conclusively settled when the Appellate Court, which rendered the final decision in said cause, had not ruled upon such matter and had not intended to settle or decide it, and when it had not even been called to the attention of that Court.

ARGUMENT.

I.

The principle of uniformity within a State between State and Federal Courts, as to a matter of local law, has been established by *Erie R. R. vs. Tompkins,* 304 U. S., pp. 74-77.

A fact established by the highest State Court is conclusive and controlling on a Federal Court. *Stoner vs. New York Life Company,* 311 U. S. 464; *Helvering vs. Rhodes Estate,* 117 Fed. (2d) 509 (8th Cir.).

The Supreme Court of Missouri established the facts; adjudged them to constitute fraud; and decided that the decree, which had resulted therefrom had constituted a fraud upon the rights of the other remainderman. Her rights were identical with those of Petitioner.

II, III and IV.

Where, after the first Federal decision, which had rested on local law, the supervening decision by the Supreme Court of Missouri in direct relation to the matter created a new situation and established such local law, such supervening decision, *as to such local law,* was final and conclusive and should have been given effect by the Federal Court, as opposed to its own former decision, *as to a matter of local law. Blair vs. Commissioner,* 300 U. S., p. 9; *Messenger vs. Anderson,* 225 U. S., p. 444.

The finality and supremacy of State decisions as to local law has been established by *Erie R. R. vs. Tompkins,* supra, and by multiple decisions which followed it.

The corresponding finality and supremacy of Federal decisions as to Federal law—Federal questions—is equally well established. *Tait vs. Railroad,* 289 U. S. 620; *Deposit Bank vs. Frankfort,* 191 U. S. 499; *Cohens vs. Virginia,* 6 Wheaton 204.

The principle was stated thus in the *Frankfort* case:

> "The same reasoning which permits to the States the right of final adjudication upon purely state questions requires no less respect for the final decisions of the Federal courts of questions of national authority and jurisdiction" (191 U. S., p. 517).

In order to make effective the finality and supremacy of State decisions, *as to matters of State law,* this Court has specifically decided that where, after one Federal judgment, as to a matter of State law, a supervening decision by the highest State Court had ruled to the contrary, the Federal Court, in further litigation, must follow the supervening State decision, as opposed to its own former decision to the contrary. *Blair vs. Commissioner,* 300 U. S., p. 9; *Messenger vs. Anderson,* 225 U. S., p. 444.

In order to make effective the finality and supremacy of Federal *decisions as to Federal law,* this Court has constantly ruled that a matter of Federal law finally adjudicated in the Federal Courts can not be impaired by State decisions. *Tait vs. Railroad,* 289 U. S. 620; *Deposit Bank vs. Frankfort,* 191 U. S. 499; *Stoll vs. Gottlieb,* 305 U. S., p. 170.

The ruling in the *Blair* and *Messenger* cases, *supra,* protected the supremacy and finality of State decisions as to State law.

The ruling in the *Tait* and *Frankfort* cases, *supra,* protected the supremacy and finality of Federal decisions as to Federal law.

The two distinctly different rulings, applicable to two distinctly different situations, are examples and illustrate how State decisions as to State law become supreme in Federal courts and how Federal decisions as to Federal law become supreme in State Courts.

The two distinctly different rulings are necessary in the

two distinctly different situations in order to maintain the principle and to make it effective.

If a Federal Court may follow its own previous decision, as to a matter of local law, as opposed to a supervening State decision to the contrary, the principle of finality and supremacy of State decision as to local law becomes a myth.

This Court has recognized the distinction between the two different rulings. See *Blair vs. Commissioner,* 300 U. S., p. 9. There a Federal judgment had rested on State law. A supervening decision by the State Court had changed the situation. It was contended that under the *Tait* case and under the *Frankfort* case the former Federal decision was binding. This Court said briefly:

> "We think that the ruling in the Tait case is not applicable."

The opinion does not state the reason *why* such ruling was not applicable.

The reason that the ruling in the *Tait* and *Frankfort* cases "was not applicable" to the situation in the *Blair* case must be because of the supremacy and finality of State decisions as to State law, and because that supremacy and finality must be maintained.

The reason for the two different rulings in two distinct situations is of national importance in the proper relationship between Federal and State Courts in the establishment and maintenance of the finality and supremacy of each judiciary within its proper sphere.

The holding by the Court below that the binding effect of a former Federal decision, *as to a matter of local law,* could not in any way be affected by a supervening decision of the highest State Court as to a matter of local law, which State decision changed the situation—a State decision which had invalidated a State decree, which State decree had been the sole support for the Federal judgment, is contrary to the law as declared by this Court.

The citation by the Court below of the *Tait* and *Frankfort* decisions in support of its ruling, clearly demonstrates a failure on the part of the Court below to distinguish between the two different rulings applicable to two different situations.

An explicit statement by this Court of the *reason why* this Court decided in the *Blair* case "the ruling in the Tait case is not applicable" (300 U. S., p. 9) seems necessary.

Such an explicit statement by this Court would compel a decision that the ruling in the *Tait* case and in the *Frankfort* case is not applicable to the instant case, because the principle of those cases is limited to the finality of Federal decisions as to Federal questions. See *Stoll vs. Gottlieb*, 305 U. S., p. 170.

To carry into effect the finality and supremacy of State decisions as to local law, Federal Courts give to decrees of State Courts *only* the effect which is given to them by the Courts of that State. *Wright vs. Georgia R. R.*, 216 U. S., p. 429; *Covington vs. First National Bank*, 198 U. S. 100.

In the *Covington* case the Court said that the case of *Deposit Bank vs. Frankfort* had been only concerned with the effect to be given to a Federal judgment when pleaded in a State Court (p. 109).

It then said:

> "We are now dealing with the weight to be attached to a state judgment when pleaded as res judicata in a Federal court. That was the very question decided by this court in the case of Union & Planters' Bank v. Memphis, 189 U. S. 71, wherein it was held that the Federal courts were not required to give to such judgments any greater force or effect than was awarded to them by the courts of the State where they were rendered. Upon this branch of the case the question then is, What effect is given in the courts of Kentucky to such pleas of estoppel?" (p. 109.)

Under the decisions of this Court, the Court below should not have given to the decree of the State Court any greater effect than was given it by the Supreme Court of Missouri, and the Supreme Court of Missouri invalidated it.

V.

This Court has granted certiorari to review a decision by the highest Court of Missouri. *Gorman, City Treasurer, vs. Washington University,* No. 711.

There the basis for the petition was that the Supreme Court of Missouri had violated the principle of the supremacy of State decisions, *as to matters of local law,* established by *Erie R. R. vs. Tompkins,* supra.

In an early tax case the Supreme Court of Missouri had decided that the charter of Washington University had not constituted a contract—a matter of local law. On review, this Court held to the contrary and reversed the Supreme Court of Missouri *on a matter of local law.*

Subsequently, this Court established the principle of supremacy and finality of State decisions as to local law. *Erie R. R. vs. Tompkins,* supra.

Thereafter, in a later tax case, the Supreme Court of Missouri held that it was bound by the decision of this Court in the first case.

This Court was asked to review such holding by the Supreme Court of Missouri on the ground that that Court had erred in following a former Federal decision (a decision by this Court) as to a matter of local law, instead of following its own earlier decision, as to such local law, which had been to the contrary.

This Court was also asked to review its own decision in the first case in the light of the principle established in *Erie R. R. vs. Tompkins.*

The writ was granted.

That case presents for decision:

(a) What effect is a State Court to give to a former Federal decision, as to a matter of local law, as opposed to its own decision, as to local law, which was to the contrary?

(b) What effect will this Court give to its own former decision on a matter of local law, which was contrary to the decision of the highest State Court, in view of the supervening decision by this Court, which establishes the finality and supremacy of State decisions as to local law?

The instant case presents for decision: What effect may a Federal Court give to its own former decision as to a matter of local law, which decision is contrary to a supervening decision by the highest State Court, in view of the finality and supremacy of State decisions as to local law?

The principles applicable to Cause No. 711 should affect the instant case, entirely apart from the fact that here the underlying State judgment, which had supported the first Federal judgment, and which the Federal Court had accepted as the local law, had been the result of fraud.

VI, VII and VIII.

Public policy demands that there be an end to litigation; it also demands that the integrity of judicial action remain inviolate.

Which rule of public policy shall prevail when they come into conflict?

A three-Judge Federal Court set aside the infamous insurance compfomise in Missouri. The opinion was written by presiding Judge Stone of the Eighth Circuit in *American Insurance Company vs. Ray B. Lucas et al.*, 38 Fed. Supp. 926, and said in part:

"This brings into direct conflict two established rules of public policy. One is the desirability of final-

ity of decrees after the entry term, based upon the public policy that there should be an end to litigation. The other is the protection of the integrity of judicial action, based upon the public policy that courts of justice must not be used as instruments to effectuate frauds or injustices.

"One of these rules must give way to the other. We can think of no rules of public policy attaching to the judiciary of equal importance to those which protect the integrity of the exercise of judicial power. * * *

"* * * We believe it is more essential to preserve the integrity of the Courts than to terminate particular litigations. So long as there remains anything which a court can do in a particular litigation to protect its integrity, we think it has the power to act: provided only, that such action is based upon a full opportunity for hearing by all interested parties.

"* * * In applying the 'clean hands' maxim the Court is concerned primarily with protecting its own integrity from improper action by a party. * * * The latter [the maxim of 'clean hands'] need not be even pleaded; may come to the attention of the court in any way; and the court will act *sua sponte* * * *. Even when the matter is brought to the attention of the court by a pleading, the court acts 'not out of any regard for the defendant who sets it up, but only on account of the public interest' (McMullen vs. Hoffman, 174 U. S. 639, 669).

* * * * * * *

"* * * 'that there is and can be no law or practice which would compel a * * * court of bankruptcy or any other court to become a party to a fraud' (Zeitinger vs. Hargadine-McKittrick Dry Goods Co., 244 Fed. 719, 722)" (38 Fed. Supp., pp. 931, 932, 934 and 935).

The opinion below has sustained a plea of res adjudicata and by doing so has violated the integrity of judicial

action. A review by this Court of the decision below is of national importance in the protection of the integrity of judicial action lest, under the cloak of res adjudicata, Courts are to become instruments for the perpetuation of fraud and injustice.

> "Fraud will vitiate everything, even the most solemn transactions; *and an asserted title to property, founded upon it, is utterly void*" (*U. S. vs. The Amistad*, 15 Peters, p. 594).

In violation of that principle, the Court below has sustained a title asserted by Respondent, which is founded solely upon

> (a) the decree in the will construction suit, which is void because of fraud; and
> (b) a judgment at law of the Federal Court, which judgment itself had rested solely upon such State decree, which State decree has subsequently been invalidated because of fraud, and was, therefore, void.

Under the decisions of this Court, fraud vitiates everything.

Under the law of Missouri, where a decree has been obtained by fraud, it is void, and when fraud in obtaining such decree has been established, any estoppel of such decree vanishes. *Wagoner vs. Wagoner*, 287 Mo. 567, 229 S. W. 1064; *Howard vs. Scott*, 225 Mo., p. 711.

Even the decision, which had been erroneously relied upon by the Court below as a reason for its ruling, to wit, *Deposit Bank vs. Frankfort*, 191 U. S. 499, has no application where the underlying and basic judgment had been the result of fraud.

The opinion in the *Frankfort* case carefully and explicitly excluded from the effect of the decision a situation where the basic and underlying judgment had been the result of fraud.

The opinion states that the doctrine of estoppel by judgment is founded on "a judgment or decree *lawfully* rendered" (191 U. S., p. 510).

The opinion sustains the estoppel of a judgment "*unless it was shown that the judgment relied upon was obtained by fraud*" (191 U. S., p. 511).

Said opinion cited and followed *Crescent City Live Stock Company vs. Slaughter House Company,* 120 U. S. 141, where this Court ruled that nothing can be permitted to destroy the effect of a judgment "*except fraud in procuring the judgment itself*" (120 U. S., p. 159).

Thus the decisions of this Court have carefully and explicitly refused to give any effect as an estoppel to a Federal judgment which rests solely upon a judgment which had been the result of fraud.

In the instant case the first Federal judgment rested solely upon a State decree.

A subsequent decision by the Supreme Court of Missouri has established that such State decree had been the result of fraud.

That decision vitiated the basic judgment and must vitiate and render nugatory the dependent Federal judgment, unless "fraud is to find shelter in the decrees of courts" (287 Mo. 567).

IX.

When the sole foundation for a judgment is a former decree, and when such former decree has been reversed or set aside, the dependent judgment is rendered nugatory—both are vitiated by the common error.

That is both reason and law. *Butler vs. Eaton,* 141 U. S. 240; *Chicago & Vincennes R. R. vs. Fosdick,* 106 U. S., p. 84; *Ballard vs. Searls,* 130 U. S., p. 54.

Such is the law in Missouri. *Overton vs. Overton,* 327 Mo. 530, 37 S. W. (2d), p. 568.

In *Butler vs. Eaton,* this Court said:

> "The judgment complained of is based directly upon the judgment of the Supreme Judicial Court of Massachusetts, which we have just reversed. It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed. Why, then, should not we reverse the judgment which we know of record has become erroneous and save the parties the delay and expense of taking ulterior proceedings in the court below to effect the same object?" (141 U. S., pp. 243-44).

In those cases the basic and underlying judgment had been reversed or set aside. For that reason, this Court said that the whole foundation for the judgment was without valid force or effect and ought never to have existed.

Furthermore, the Court below ruled that nothing in the decision by the Supreme Court of Missouri, which invalidated the State decree for fraud, could affect in any way the force and effect of the judgment of the Federal Court in the action at law, and in support of that ruling relied upon *Deposit Bank vs. Frankfort.*

The *Frankfort* decision shows that a Federal judgment, which rested upon a State decree, subsequently reversed, is not conclusive *in the Federal Court, which had rendered such dependent judgment.*

The majority opinion in the *Frankfort* case held that, after reversal of the supporting judgment, the dependent judgment remained as an estoppel *in Courts other than the Court which had rendered it.*

But the same majority opinion ruled that the Court *which had rendered* such dependent judgment *could set it aside* after reversal of the supporting judgment. The opinion said:

> "There the court [which had rendered such judgment] may reconsider and set aside or modify its judgment upon seasonable application" (p. 512).

The minority opinion did not dissent from that ruling.

The minority held that after reversal of an underlying judgment the dependent judgment could not constitute an estoppel in any Court.

The minority opinion said that with the reversal of the underlying judgment "the ground on which that decree rested had been swept away," and, therefore, ruled that the dependent judgment was not an estoppel *in any Court.*

The four Judges, constituting the minority who dissented, dissented only from the ruling of the majority, because the majority held that after reversal of an underlying decree, the judgment which had depended thereon itself constituted an estoppel in a Court *other than the Court which had rendered it.*

Therefore, under the express decision of this Court, the same Federal Court which had rendered the judgment at law in *Perry vs. Wiggins,* based solely upon the decree in the State Court, could have set aside its own judgment after the Supreme Court of the State had subsequently set aside or reversed the underlying and basic State decree.

Such decision is based upon principle:

> "* * * where a judgment was based upon a previous judgment, and the latter was subsequently reversed or set aside, it was held that relief might be obtained from the second judgment *by motion to vacate it*" (*Freeman on Judgments,* Vol. 1, Sec. 199).

That principle has been applied in *Heckling, Ex., vs. Allen,* 15 Fed. 196.

But, in direct conflict with that specific decision by this Court, the majority below ruled that the subsequent decision by the Supreme Court of Missouri, invalidating the

State decree for fraud, could not, in any event, affect in any way the judgment at law in *Perry v. Wiggins,* which had rested solely on such State decree.

Here the Supreme Court of Missouri had done more than reverse the underlying State decree—it had invalidated the same for fraud and had thereby established that such decree had been void *ab initio.*

Petitioner here followed the procedure stated by this Court in the *Frankfort* case.

Petitioner suggested to the Court below that it direct the District Court to vacate said judgment at law, or to direct the District Court to permit the filing of a proceeding to vacate that judgment, either by motion or by a separate suit in Equity (R., p. 332).

Petitioner's suggestion to vacate said judgment at law necessarily could not have been made until after the Supreme Court of Missouri had invalidated the State decree for fraud.

Since the Federal judgment at law had been affirmed by the Court of Appeals (the Court below), Petitioner could not apply to the District Court without leave of the Court of Appeals. *Ballard vs. Searls,* 130 U. S., p. 55.

The Court below, however, disregarded such suggestion.

The dissenting opinion below had said that the Court certainly had the right to declare their judgment at law nugatory under the circumstances, or to allow any pleading amendment that might be necessary to achieve that result.

X.

1) The Court below has sustained a State decree, which the highest State Court decided had been the result of fraud and had been a fraud upon the rights of a contingent remainderman.

2) The Court below has sustained a decree, which is a legal perversion. It perverts justice. It perverts the very purpose of the suit in which it appears. That suit was filed

"to give full effect to the intent." The decree defeats that intent as it was stated by the highest State Court in the same case, and also as that intent was expressly decided by that Court in a later companion case.

3) The Court below has not only sustained such decree itself, but has also sustained a Federal judgment, which was dependent and rested solely upon said decree.

4) Thereby the Court below has given substance and full effect to a mere nullity—a decree which has been rendered void for fraud by the decision of the very Court which had unwittingly affirmed said decree—and, as shown by the opinion of that Court, it had affirmed the decree because of the statements and representations of counsel as to the intention of the testator, and because of the omissions of counsel to inform that Court of the provision in the decree which had contradicted that intention.

5) The Court below, sitting in Equity, allows Respondent to hold property under such void decree, although it admits that the decree is wrong and it accepts the decisions by the Supreme Court of Missouri that Petitioner had become the owner of that property in 1928.

6) Sitting, therefore, as a Court of Equity, the Court below permits a voided decree to shield one who has no claims to property against the claims to that property by the owner thereof as established by the law of the State.

The Respondent pleaded in this case in Equity a decree and a judgment, both of which were wrong, and which worked an injustice.

Under the decisions of this Court, a party in Equity may not have any benefit from a decree which is wrong or which does an injustice. *Gay vs. Parpart,* 106 U. S. 679; *Lawrence Manufacturing Co. v. Janesville Mills,* 138 U. S., p. 561; *Lewers & Cooke vs. Atcherly,* 222 U. S., p. 294. In those cases this Court established and laid down for the United States the principle known in England as Lord Redesdale's

Rule, to wit, that where a party is in a Court of Equity claiming the benefit of a former decree, the Court will not lend its aid where it is manifest that the elements of either injustice, mistake, surprise or misapprehension had been present.

IF THIS CASE WERE IN THE COURTS OF MISSOURI, PETITIONER WOULD RECOVER.

The Supreme Court of Missouri has decided that the property vested absolutely in her in 1928; that the State decree to the contrary is wrong; that such wrong decree resulted from fraud.

Under the law of Missouri, a decree obtained by fraud is void and any estoppel thereof vanishes. *Wagoner vs. Wagoner,* 287 Mo. 567; *Howard vs. Scott,* 225 Mo., p. 711.

Under the law of Missouri, where a judgment which was wrong had resulted from accident, mistake or fraud, and where such wrong judgment had been the basis and foundation of a second or dependent judgment—a judgment at law—and such dependent judgment had been affirmed by the highest State Court, the Courts of Missouri will grant relief in Equity against the first underlying judgment which was wrong, and will disregard the second or dependent judgment, which had rested upon the first erroneous judgment. *Overton vs. Overton,* 327 Mo. 530, 37 S. W. (2d), p. 569.

That decision was specific and held that the plaintiff there was entitled to relief in Equity from the first erroneous judgment which had resulted from accident, mistake or fraud, and that the judgment at law, which had rested solely upon it, was not res adjudicata.

The same decision establishes that under the law of Missouri:

(a) a party will be relieved from the consequences of accident, fraud or mistake, unless such party had

been culpably negligent and that culpable negligence means "the violation of a positive legal duty"; and

(b) that even a clearly established negligence may not defeat relief from fraud, accident or mistake if the other party has not been prejudiced thereby (327 Mo. 530).

Petitioner here was not negligent in failing to appear in the will construction suit.

At that time she had no right and no estate, but merely a possibility of acquiring thereafter a future interest, which was then contingent.

Under the law of Missouri, a prospective contingent remainderman has no standing in Court to obtain an adjudication as to future interests which may never vest in him. The law prohibits such a premature adjudication of a nonexistent right, and one which may never come into existence. *Shaller vs. Mississippi Valley Trust Co.,* 319 Mo. 128; *Bradley vs. Goff,* 243 Mo., p. 103; *Lich vs. Lich,* 158 Mo. App., p. 425.

In holding that the Petitioner could not recover, the Court below ruled contrary to the law of Missouri, which is controlling.

XI.

The final decision in the will construction suit was rendered by the Supreme Court of Missouri. That Court did not rule upon the title here involved.

The Court below said:

"That the Supreme Court of Missouri did not rule on these questions would not affect the conclusiveness of the decree" (R., p. 292).

That ruling conflicts with the ruling of the Sixth Circuit in *Westinghouse Electric Mfg. Co. vs. Wadsworth Electric Co.,* 51 Fed. (2d) 447.

It conflicts with the ruling of the Second Circuit in *Moran Towing Co. vs. Navigazione etc.,* 92 Fed. (2d), p. 40.

It conflicts with a previous ruling by the Eighth Circuit itself in *Great Northern Ry. Co. vs. Gen. Ry. Signal Co.*, 57 Fed. (2d), p. 461, where the Court said:

> "*Only* the questions which the *Appellate Court* had before it *and which were considered and intended to be decided* would be settled by the decree" (p. 461).

This Court has decided:

> "If the pleadings and the *opinion* of the court show that any portions of the prior decree went beyond the issues litigated, the court in the subsequent suit *limits the binding effect of this decree to the questions which were actually presented to the court for decision*" (*Oklahoma vs. Texas*, 256 U. S., p. 78).

Since the Appellate Court renders the final decision in any Equity case, the binding force and effect of a decree is limited to matters which were decided by the Appellate Court. *Van Fleet's Former Adjudications*, Vol. II, p. 632, Sec. 283; Vol. I, p. 124, Sec. 27.

But over and beyond the conflict of decision as to the particular point involved in the respective cases, it is clear that nothing said in any one of the opinions in said cases can control the situation here present.

The opinion below overlooks the following facts, which go to the roots of Justice and raise a question of common honesty and fair dealing, to wit:

Mrs. Wiggins brought the suit to construe the will.

In that case in the Circuit Court counsel for Mrs. Wiggins agreed to the paragraph of the decree which directed that on the death of a daughter one-half (½) of her one-third (⅓) should go to each of her surviving sisters for life, *and on the death of either*, should go to the *survivor* for her life, and upon the death of the *last survivor*, then to contingent remaindermen (Phys. Ex., p. *522).

On appeal, counsel for Mrs. Wiggins told the Supreme

Court of Missouri that the testator intended that the portion of a daughter dying without issue should go

> "to the survivors of the daughters, again with remainders over to the *heirs of their bodies.*"

The Supreme Court of Missouri has so stated (R., p. 365).

Counsel for Mrs. Wiggins did not advise the Supreme Court that the paragraph in the decree of the Circuit Court had contradicted that intention. The Supreme Court has so found (R., p. 369).

In this case counsel for Mrs. Wiggins states in her answer herein:

> "* * * appellants * * * upon said appeal, * * * did not present to the State Supreme Court * * * the question as to the correctness in fact and law of the provision of said decree" (R., p. 24).

He further states in said answer that no one

> "had presented to the State Supreme Court for review and decision by it, the question whether that part of the decree of the State Circuit Court which gave to the two surviving sisters of Cora B. Fowler, successive life estates * * * was or was not correct * * *" (R., p. 24).

His answer further states:

> "inasmuch as the decree of the State Circuit Court had held that if one daughter died without issue, leaving two sisters surviving, *the latter would take successive life estates, the daughters (appellants) had no desire to have that provision reviewed or altered*" (R., p. 33).

Counsel for Mrs. Wiggins has argued that such paragraph is conclusive because it was not presented to the Supreme Court in the will construction suit and simul-

taneously argues that it was not presented to the Supreme Court because Mrs. Wiggins and her sisters did not wish to have it reviewed or altered, because it gave to them "successive life estates," although the same counsel told the Supreme Court that the testator intended to the contrary.

The majority of the Court below sustain that contention and do so after the Supreme Court of Missouri has said:

> "No judge, by reading the briefs in the will construction suit appeal, would even *suspect* such a construction as that contained in the challenged paragraph of the decree" (R., p. 366);

and has also stated:

> "the briefs would suggest that no such construction was made, * * *" (R., p. 366).

Such construction has been branded by the Supreme Court of Missouri as being "untenable" and as being "contrary to all the rules of construction" and that "no word juggling as to remainders, etc., can, in reason, reach such result."

Under these peculiar facts, a ruling that the decree of the trial Court is conclusive, when it contradicts the statements in the opinion of the Supreme Court, and when such paragraph was not presented to the Supreme Court because the appellants did not wish to have the same reviewed by that Court, sanctions and approves the making of erroneous representations by a party to the highest Court of a State in an equity case.

Such can not be the law in any Court and if any opinion of any Federal Court sustains such a proposition as the law, we submit that this Court, in its supervisory power to administer Justice, will rule to the contrary.

CONCLUSION.

The facts have been established by the Supreme Court of Missouri. Its decisions settle the applicable local law.

In lieu of further brief or argument, we refer to the decision by the highest Court of Missouri in the companion case of *Kennard vs. Wiggins.*

The decisions of this Court establish the finality and supremacy of State decisions as to matters of local law.

The accident of diversity of citizenship should not disturb the equal administration of Justice in co-ordinate State and Federal Courts sitting side by side. Any other ruling would do violence to the principle of uniformity within a State, upon which the *Tompkins* decision is based. *Klaxon Co. vs. Stentor Co.,* 313 U. S., p. 496.

Petitioner, therefore, respectfully urges this Court to grant the Petition herein so that your Petitioner may recover the property which the highest Court of Missouri said vested absolutely in her in 1928, and recover the same from Respondent, whose asserted title thereto rests solely upon a decree, which the highest Court of Missouri has established had been the result of fraud, and had been a fraud upon the rights of a contingent remainderman, whose rights were identical with those of this Petitioner.

Petitioner prays that a writ of certiorari be issued to the Circuit Court of Appeals for the Eighth Circuit to the end that this cause may be reviewed and determined by this Court, and the judgment of the Court below reversed.

PAUL BAKEWELL, JR.,
St. Louis, Missouri,
Counsel for Petitioner.

With him on Brief:
JOHN E. CRAMER, JR.,
CLAUDE I. BAKEWELL,
St. Louis, Missouri.

(23)

FEB 16 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

MARY LOIS McINTOSH,
Petitioner,

v.

ELLA L. WIGGINS,
Respondent.

No. 915.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, In Equity.

BRIEF FOR RESPONDENT, IN OPPOSITION.

HARRY W. KROEGER,
DANIEL N. KIRBY,
of St. Louis, Missouri,
Counsel for Respondent.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

MARY LOIS McINTOSH, Petitioner,

v.

ELLA L. WIGGINS, Respondent.

No. 915.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, In Equity.

BRIEF FOR RESPONDENT, IN OPPOSITION.

Opinion Below. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported as *"McIntosh v. Wiggins,"* No. 11,781, In Equity,—123 F. 2d (Pamphlet No. 3, December 22, 1941), pages 316-323, and the dissenting opinion at pages 323-324.

Jurisdiction. Neither the petition for a writ, nor the brief in support, cites the Sections of the Judicial Code under which petitioner seeks to invoke the jurisdiction of this

Court to grant a writ, as required for such petitions by Rule 38, par. 2, and by Rule 12, par. 1, of this Court.

We shall contend later herein, that the instant petition does not present any such special or important reasons for granting a writ, as Rule 38 of this Court, paragraph 5 (b), indicates would appeal to the Court's discretion to grant such writ.

The petitioner herein will sometimes be referred to as Mrs. McIntosh, and respondent as Mrs. Wiggins. All italics herein are ours.

Summary Statement of the Matter Involved. A correct and summary statement of most of the facts relevant to the pending petition for a writ and of the matter involved is contained in the majority opinion below (*McIntosh v. Wiggins*, 123 F. 2d, at 318-320). Adopting said statement, we here print and quote a copy, including in brackets our own statements of supplemental and explanatory facts and other matter, deemed necessary to an adequate statement of the matters here involved [123 F. 2d, at 318]:

> "The appellant [Mary Lois K. McIntosh, petitioner herein for a writ] brought this action asking that the appellee [Ella L. Wiggins, respondent in said petition for a writ] be required to turn over to appellant certain property, together with the rents and profits thereof, and that appellee be enjoined from having the benefit of a provision of a decree of the Circuit Court of the City of St. Louis entered June 22, 1923, upon which it is asserted the appellee bases her right to withhold the property from appellant. From a decree dismissing the action, this appeal is taken.
>
> "The property involved is an undivided one-fourth of that portion [one-third] of the estate of John E. Liggett, deceased, which, by the terms of his will, went to his daughter Cora B. Fowler for life on the termination of two testamentary trusts. This property is held by the appellee, and she claims a life interest in it

under the will of John E. Liggett as construed by the decree of the Circuit Court of the City of St. Louis entered June 22, 1923, and also under the judgment of the United States District Court for the Eastern District of Missouri, affirmed by this Court in Perry v. Wiggins, 57 F. 2d 622 (certiorari denied 287 U. S. 609). [Petitioner's maiden name was Mary Lois Kilpatrick. Her married names at various dates referred to in litigation, to which she was a party, and concerning the will of John E. Liggett, were Mary Lois Hayes, Mary Lois Perry, plaintiff in Perry v. Wiggins, supra,—and Mary Lois McIntosh.]

"The appellant asserts that, by the terms of the will of John E. Liggett, who was her grandfather, she, on August 10, 1928, when her mother, Dolly L. Kilpatrick, died, became entitled to one-half of the [one-sixth interest in the] property in which her mother had acquired a life estate on the death of Cora B. Fowler [whose share was one-third], and that the provision of the decree of June 22, 1923, of the Circuit Court of the City of St. Louis, pursuant to which the appellee claims and holds the property, is erroneous and was obtained by fraud, accident or mistake, and that the appellee should be enjoined from having the benefit of it.

"The broad question presented is whether, under the facts disclosed by the record, the court below was required to grant the appellant the relief which she sought. To state these facts in complete detail would be more confusing than helpful. We shall refer to them only so far as necessary.

"The three daughters of John E. Liggett, a resident of St. Louis, Missouri, who died testate November 23, 1897, leaving a large estate, were Cora B. Fowler, Dolly L. Kilpatrick and the appellee, Ella L. Wiggins. The trusts created by the will terminated April 4, 1916. At that time the three daughters became entitled to receive the major portion [three-fourths] of their father's estate [one-fourth went to his grandson,—son of a deceased son]. They each received an undivided one-third of this [three-fourths] portion. They con-

ceived the idea that, under the will, they acquired estates in fee and not for life.

"[Following the termination of the trusts, the then trustees filed an 'accounting' suit in the state circuit court, to which Mrs. McIntosh was a party under her then name, Mary Lois Hayes (Phys. Ex. p. *196). The decree in said suit allotted one-fourth of the trust estates to the grandson, and three-fourths to the three daughters. The decree in said accounting suit expressly refrained from deciding whether the daughters took life estates or fees in their said three-fourths portion, but expressly reserved to them the right to sue later for the purpose of having said question decided. Their said 'idea' or contention that they took fee titles was prompted by this portion of said decree.]

"Whether their estates were in fee or for life depended upon the construction of the following provisions of the will:

" 'After the death of my said wife then my said stock * * * shall be further held by my said trustees under this trust for the sole benefit and behoof of my daughters * * * to their sole and separate use * * * for and during the natural lives of my said daughters, in equal portions, share and share alike, with remainder over as to the undivided share aforesaid, of each one, to the heirs of the body of each one of my said daughters as their absolute property, per stirpes and not per capita; but should any of my said daughters die without issue then her portion of said * * * stock herein bequeathed to her for life shall go to the survivor and survivors of my said daughters in equal portions for life, with remainder over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes.'

"[Another relevant provision of the will was that which gave to the daughters the share of the grandson in case he should die without issue before the termination of the trust,—reading:

" 'If my grandson, John E. Liggett, Jr., shall die before reaching the age of thirty years, without issue,

then and in that event his share of my estate hereinafter devised and bequeathed to him in this will shall go to such of my said daughters as shall survive him, in equal portions for life, and to the issue of such of them as shall then be dead, or shall die thereafter, share and share alike, per stirpes, and not per capita; and the last of my said daughters being dead the whole of John E. Liggett, Jr.'s share (he being dead before he arrives at the age of thirty years, without issue), shall go to and become the property of the issue of such of my said daughters as shall die leaving issue to take per stirpes, but said share is to be held and managed upon the same trusts as is provided in this clause of my will.']

"In May, 1920, the three daughters brought suit in the Circuit Court of the City of St. Louis to secure a construction of the will of their father, asserting that upon the termination of the trusts created by the will, they took fee title to their shares of the estate. All of the then existing descendants of the testator were made parties to the suit, including [among the defendants] the appellant, [under her then name, Mary Lois Perry], who was an adult daughter of Dolly L. Kilpatrick, and including, also, Elizabeth Liggett Scudder, a minor [defendant], who later became Elizabeth Kennard and who was the child of Elizabeth Scudder, a deceased daughter of Dolly L. Kilpatrick. If Dolly L. Kilpatrick had only a life interest in her share of her father's estate, with remainder over to her issue, then on her death the appellant and Elizabeth Scudder would, under the will of John E. Liggett, each take an undivided one-half of that share. If Dolly L. Kilpatrick and her sisters had a fee title to their respective shares, the appellant and Elizabeth Liggett Scudder would receive nothing under the will. The appellee, Ella L. Wiggins, also had an adult daughter [123 F. 2d, at 319], Eleanore Van Riper, who had two minor children. The appellant and the adult daughter of Ella L. Wiggins, although served with process in the will construction suit, did not appear. [Mrs. McIntosh was also served with a copy of the daughter's peti-

tion.] Elizabeth Liggett Scudder did appear and was represented by her father, as guardian ad litem. The grandchildren of Ella L. Wiggins were also represented by a guardian ad litem. The grandchildren of Dolly L. Kilpatrick and of Ella L. Wiggins [minor defendants] had the same counsel, who filed answers in their behalf asserting that the three daughters of John E. Liggett took estates for life in their respective shares of their father's estate, with remainder over to their surviving issue 'and, in case there be none, with remainder as to said share to the survivor or survivors of said daughters in equal portions for life, with remainder over in fee upon the death of the last survivor of said daughters to the surviving issue of said daughters, share and share alike, per stirpes.' These answers prayed that the court so construe the will. The trustees under the will, who were also parties to the suit, in their answer brought up certain doubtful questions relative to the disposition of undistributed property of the estate still in their possession, and prayed the aid and instructions of the court.

"After a trial, the Circuit Court of the City of St. Louis concluded that the daughters of the testator, by the terms of his will, took only life estates, with remainder to their issue. Counsel for the minor grandchildren of the two daughters of the testator who had issue (Cora B. Fowler was childless) was asked to draft the decree. [Lacking express instructions from the court concerning the court's view of the intended disposal of the share of a daughter who might die without issue], he wrote into his draft of a proposed decree his interpretation of the will respecting the devolution of the share of a daughter of the testator in case of her death without issue, which was that it would go to the surviving daughters of the testator and to the survivor of them for life, and would not vest in remainder until the last surviving daughter of the testator had died. The draft of a decree prepared by counsel for the minor grandchildren was finally approved as to form by all counsel for all parties who had appeared in the suit, and [after examination by

the trial judge] was entered by the court as its decree. The daughters of the testator then appealed to the Supreme Court of Missouri on the sole issue as to whether they had fee title to their shares of their father's estate. The questions as to what would become of the share of a daughter having a life estate, in the event she died without issue, and as to when the share of such a daughter would vest in remainder were not in dispute, were not raised, and, of course, were not before the Supreme Court of Missouri on the appeal. That court decided that the daughters of the testator took life estates only, and affirmed the decree appealed from. Wiggins v. Perry, 271 S. W. 815. In its opinion, the Supreme Court of Missouri copied almost verbatim a statement contained in the brief of counsel for the minor grandchildren, when it said (page 826 of 271 S. W.):

" 'We therefore respectfully submit that the will of John E. Liggett, construed according to its true intent and purpose, creates life estates only in his daughters, with contingent remainders over in the heirs of their respective bodies, and that the lineal descendants only of each daughter who answers the description of such heirs at the time of her death takes such remainders, and that the trial court was clearly right in so ruling.'

"It is, of course, obvious that in making that statement counsel and the court were dealing with the question of the estate which each daughter of the testator took under the will at the termination of the trusts, and were not dealing with the questions as to what would happen to the share of a daughter who died without issue and as to when title to her share would vest in remainder, which questions had not been presented on the appeal. That the Supreme Court of Missouri did not rule on these questions would not affect the conclusiveness of the decree. See and compare: Russell v. Russell, 3 Cir., 134 F. 840; Simonds v. Norwich Union Indemnity Co., 8 Cir., 73 F. 2d 412, 416.

"The decree of the Circuit Court of the City of St. Louis, affirmed on appeal, contained the following pro-

vision with respect to the devolution of the share of Cora B. Fowler:

" 'If both her sisters, Ella L. Wiggins and Dolly L. Kilpatrick, shall survive her, then an undivided one-half interest in said property shall go to and vest in each of said sisters for her life, and on the death of either of them, the undivided one-half interest therein of the one so dying shall go to and vest in the survivor for her life, and upon her death the whole of said property shall go to and vest absolutely in the then surviving issue of said Ella L. "[123 F. 2d, at 320]" Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita.'

"Cora B. Fowler died [without issue] July 19, 1928; [both of her sisters survived her]. Concededly, upon her death her share [one-third of the daughters' portion] of her father's estate passed to Dolly L. Kilpatrick and Ella L. Wiggins in equal portions for life. Dolly L. Kilpatrick died August 10, 1928, and her death is the real source of this controversy between the appellant [Mrs. McIntosh] and Elizabeth Scudder Kennard, on one side, and Ella L. Wiggins, on the other side. The appellant and Elizabeth Kennard of course received Dolly L. Kilpatrick's original share of the estate, but they claimed that, under the will, they were each entitled to one-fourth of the [one-third] share of Cora B. Fowler, an undivided one-half of which share had come to Dolly L. Kilpatrick for life on Cora B. Fowler's death. Ella L. Wiggins contended that, under the will and under the decree of the Circuit Court of the City of St. Louis, she, on Dolly L. Kilpatrick's death, was entitled to have Cora B. Fowler's full share for life, and that no part of it would vest in the issue of Dolly L. Kilpatrick until after her (Ella L. Wiggins') death.

"On June 19, 1929, the appellant, then Mary Lois Perry, brought an action in the United States District Court for the Eastern District of Missouri against Ella L. Wiggins to determine adverse claims. In that action appellant sought a judgment that, upon the death

of her mother [Mrs. Kilpatrick], one-fourth of Cora B. Fowler's share of the [trust] estate of John E. Liggett, one-half of which share appellant's mother had acquired for life on Cora B. Fowler's death, belonged to the appellant and did not belong [for life] to Ella L. Wiggins, who had possession of it. [Only the realty in the trust estate was directly involved.] Issues were joined. The question whether the decree of the Circuit Court of the City of St. Louis was determinative of the rights of the parties and was res judicata as to all issues was squarely presented. The appellant asserted that the decree of that court was not binding upon her because the above quoted provision of the decree relative to the devolution of the share of Cora B. Fowler was not within the issues tendered by the petition in the suit in which the decree was rendered; that the question of what would become of a share of a daughter who should die without issue had not been before the Circuit Court of the City of St. Louis for decision, and that that court had had no power to decide it. The United States District Court adjudged that the decree of the Circuit Court of the City of St. Louis in the will construction suit was within the issues tendered by the petition in that suit and was res judicata; that that court had had jurisdiction of the parties and of the entire subject matter covered by its decree in that suit; that appellant was bound by the decree and by the provision thereof of which she complained; and that Ella L. Wiggins was entitled to retain during her life the share of the estate of John E. Liggett in which Cora B. Fowler had originally had a life interest, and that no part of that share would vest in the surviving issue of Dolly L. Kilpatrick and of Ella L. Wiggins until the latter's death. Appellant took an appeal from the judgment. The judgment was affirmed by this Court in Perry v. Wiggins, 57 F. 2d 622 [on August 25, 1931; Phys. Ex. p. *553], and it became a final judgment.

"An abortive attempt by the appellant and her niece, Elizabeth Kennard, was made in 1933 to have the decree of the Circuit Court of the City of St. Louis in

the will construction suit corrected *nunc pro tunc* by that court. Wiggins v. Perry, 119 S. W. 2d 839. Appellant had commenced the present action in the court below in [March] 1931, and at or about the same time Elizabeth Kennard brought a similar action against Ella L. Wiggins in the Circuit Court of the City of St. Louis.

"In this case appellant again seeks to avoid the provision of the decree of the Circuit Court of the City of St. Louis which was held to be binding and conclusive upon her by the court below in the case of Perry v. Wiggins (affirmed, 57 F. 2d 622), and now asserts that the presence in the decree of that provision was the result of fraud, accident or mistake, and that the appellee should therefore be prevented from having the benefit of it. [The above quotation from the statement in the majority opinion in *McIntosh v. Wiggins*, 123 F. 2d, ends here, at page 320, but is resumed at page 322, as follows]:

"Since the entry of the decree of the court below in this case, the Supreme Court of Missouri, in the case of Kennard v. Wiggins, decided July 25, 1941,[1] has ruled that the challenged provision of the decree of the Circuit Court of the City of St. Louis was wrong with respect to the devolution of Cora B. Fowler's share of the estate of her father, and that, on Dolly L. Kilpatrick's death, the half of the share of Cora B. Fowler in which Dolly L. Kilpatrick had acquired a life estate vested in appellant and Elizabeth Kennard; that the latter is not bound by the decree of the Circuit Court of the City of St. Louis because she was a minor during the pendency of the will construction suit and those who represented her could not authorize or consent to the entry of any decree prejudicial to her rights."

[The quotations from the "statement" part of said opinion of the Circuit Court of Appeals end here.]

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1 We are advised that this case is not yet reported, and that a petition for rehearing is pending.

A copy of the first opinion of the Supreme Court of Missouri in *Kennard v. Wiggins* was filed by leave (R. 237) on behalf of Mrs. McIntosh, in the United States Circuit Court of Appeals, and in her instant suit against Ella L. Wiggins on September 8, 1941; a copy appears at R. 239-251. On the same day leave was granted to Mrs. Wiggins to file in the same court copies of her separate motions in the Supreme Court of Missouri "For Rehearing" and "To Withdraw and Modify" said opinion. Said copies were filed in the United States Circuit Court of Appeals on September 18, 1941 (R. 288). A copy of said motion for rehearing in the *Kennard* case is set out at R. 252-272; a copy of said motion to withdraw and modify said opinion in the *Kennard* case is set out at R. 272-288. Thereafter, on November 12, 1941, Mrs. McIntosh filed in the United States Circuit Court of Appeals her "Petition for Rehearing" in the instant cause; a copy appears at R. 303-342; said petition was denied by said Circuit Court of Appeals on November 26, 1941 (R. 343). On December 16, 1941, the Supreme Court of Missouri "On its own motion" modified its former opinion in the *Kennard* case, and by the same order overruled Mrs. Wiggins' above mentioned motions for rehearing and to withdraw and modify the original opinion in said cause (R. 355). On December 23, 1941, Mrs. McIntosh filed in the United States Circuit Court of Appeals, and in the instant cause, her Motion to Set Aside and Vacate the Judgment of said Circuit Court of Appeals, because of said modified opinion of the Supreme Court of Missouri in the *Kennard* case; a copy of said motion is set out at R. 347-371. On January 6, 1942, said Circuit Court of Appeals denied said motion (R. 372).

Thereafter, within rule time after the filing of the modified opinion of the Supreme Court of Missouri, Mrs. Wiggins filed in said Court her separate motions "For Rehearing" and "To transfer to said Court in Banc" as to the said

appeal in the *Kennard case.* At the time this brief is being written, neither of said last-mentioned supplemental motions has been ruled upon by said state Supreme Court.

Additional explanations or corrections of certain statements in the instant Petition and Supporting Brief for Mrs. McIntosh will be made in those portions of the Argument herein to which they relate. If the Court desires a more detailed statement of the facts in the instant McIntosh case, they will be found in the "Findings" of the District Court, set out at R. 123-196. The conclusions of the District Court are set out at R. 196-201, the directions for judgment at R. 201, and a copy of the judgment at R. 202.

ARGUMENT.

The Petition for a Writ (pages 20-22) states eleven separately alleged "Reasons" relied upon for the granting of a writ. To a substantial extent they are repetitious. It is respectfully submitted that the following "Argument" adequately answers the fundamental contention on which is based all of said "Reasons" considered in their entirety.

Summary of Argument.

I. The Petition for a Writ should be denied because the Circuit Court of Appeals has not decided any question of local law concerning the interpretation of the will, inconsistently with the decision of the Supreme Court of Missouri.

This is so because:

(1) The Supreme Court of Missouri and the Circuit Court of Appeals, respectively, dealt with the rights of parties differently situated.

(2) The Petition is based entirely upon an erroneous assumption and contention, since the Circuit Court of Appeals did not rule on the intent of the will.

(3) The complete fallacy of Petitioner's said fundamental contention appears from facts—indisputable upon the printed records.

(4) The doctrine of res judicata, applied in both Federal suits, was the rule, firmly established in both this Court and in the Supreme Court of Missouri, and applicable to suits between the same parties, involving the same dispute, and concerning the same, or a part of the same, property—therefore, in applying it in the instant McIntosh case, the Circuit Court of Appeals did not decide a point of law contrary to the state law on the same subject.

II. The Petition for a Writ should be denied, because it is the second such petition filed by Mrs. McIntosh, requesting this Court to hear and adjudge as between her and Mrs. Wiggins the same question of title that was involved in her first Petition for a Writ of Certiorari, which was denied by this Court.

III. The Petition for a Writ and its supporting brief err in assuming and suggesting that said modified opinion of the state Supreme Court evidences the final decision of the state Supreme Court in the Kennard case.

I. The Petition for Writ Should Be Denied Because the Circuit Court of Appeals Has Not Decided Any Question of Local Law Inconsistently With the Decision of the Supreme Court of Missouri.

(1) *This is so because the Supreme Court of Missouri and the Circuit Court of Appeals, respectively, dealt with the rights of parties differently situated.*

Mrs. Kennard, plaintiff in the state case (*Kennard v. Wiggins*, R. 356-371), was a minor at the time the will construction decree was entered. Mrs. McIntosh (plaintiff in the instant case) was then *sui juris*.

Solely because Mrs. Kennard had been a minor and because the state court held there was constructive (not actual) fraud on the part of counsel for her guardian ad litem, the state Supreme Court considered whether the disputed paragraph in the will construction decree was a correct interpretation of the will, and having decided that it was not, concluded, on both of said grounds, that said disputed paragraph was void as to Mrs. Kennard; said state court thus decided the question of "local law" upon which Petitioner relies, viz: *the meaning of the will.*

Because Mrs. McIntosh was an adult at the time of the will construction suit and had been personally served

with process and a copy of the petition therein, the Federal Courts (District and Appellate) held that she became estopped to deny that the will construction decree was correct, by her own conduct in standing mute and making no effort to defend her interests in the trust estate, and that therefore said Circuit Court of Appeals *was not required to decide whether the will had been rightly or wrongly construed.* Consequently, said court *decided no question of local law in conflict with the decision of the state Supreme Court* in the *Kennard* case. Both the Federal courts refrained from ruling on said question of local law.

The foregoing will appear upon analysis.

(2) *The Petition is based entirely upon the following erroneous assumption and contention.*

The Supreme Court of Missouri in its modified opinion in the *Kennard* case, held (a), that the disputed paragraph in the will construction decree had been wrong in its interpretation of the will, and (b), that *because it had been wrong,* the presence of said paragraph in said decree having been caused by the invalid act of the attorney for Mrs. Kennard's guardian ad litem (she being an infant defendant) in contending on her behalf for the same interpretation expressed in said paragraph, and said paragraph not having been directly called to the attention of the state supreme court in the appeal from said decree—a constructive fraud upon Mrs. Kennard had resulted. Because of the two above rulings, the basic (and erroneous) contention of the Petition for a Writ is, that the United States Circuit Court of Appeals *was obligated in the instant case to make similar rulings as to Mrs. McIntosh,* an adult defendant in said will construction suit, who, although served with a copy of the writ and petition therein, had stood mute—had made no defense in said will

construction suit, in either the state circuit, or state supreme, court.

By thus standing mute, she had estopped herself from making, in the instant McIntosh case, both of said contentions "(a)" and "(b)".

The following quotations show that the fundamental basis of the instant Petition for Writ is as above stated.

Speaking of the majority opinion of the Circuit Court of Appeals in the instant McIntosh suit, the Petition for a Writ states (page 12):

> *"The majority below give to respondent full benefit of a state decree,* which *the state law had adjudged to be wrong,* and to *have resulted from fraud."*

The "state decree" referred to is the disputed paragraph in the will construction decree. And the "state law" referred to is said modified opinion in the *Kennard* case.

Again (Petition, page 13):

> *"The majority below,* as a court of equity, *gives to* respondent *full benefit of a former Federal judgment in an action at law,* which judgment is wrong; which does an injustice; and which *rests solely upon a paragraph of a state decree,* which *the highest court of that state has adjudged to be wrong* and *has invalidated because of fraud."*

The "former Federal judgment" referred to is that in Mrs. McIntosh's first Federal suit against Mrs. Wiggins; and the "paragraph of a state decree" referred to, is again the disputed paragraph in the will construction decree.

So the fundamental contention of the Petition for a Writ is that said majority opinion and decision of the Circuit Court of Appeals in the instant *McIntosh* suit were erroneous and prejudicial to Mrs. McIntosh in two respects: (a) in that said majority opinion *itself gave to*

Mrs. Wiggins "the benefit of" (sustained as though correct) *the disputed paragraph of the will construction decree;* and also (b) in that said majority opinion *gave to Mrs. Wiggins "the benefit of" the judgment* in favor of Mrs. Wiggins, rendered in Mrs. McIntosh's first Federal suit against Mrs. Wiggins, which said judgment *"rests solely upon" the disputed paragraph in the will construction decree,* as though it were a correct interpretation of the will. And said fundamental contention argues further: that the recently modified opinion of the Supreme Court of Missouri in the *Kennard* case has held that said disputed paragraph in the will construction decree was not a correct interpretation of the will, and has also held that, therefore, but also because the attorney for the guardian ad litem of Mrs. Kennard (a minor defendant), without having lawful authority so to do, made the contention for her about the intent of the will that the state circuit court adopted as the disputed paragraph in the will construction decree, it follows that said paragraph became a constructive fraud and void as to Mrs. Kennard.

Upon the above premises, the erroneous conclusion is sought by the Petition to be established, that *because said modified opinion of the state Supreme Court established as the state law between Mrs. Kennard and Mrs. Wiggins,* that the disputed paragraph in the will construction decree was wrong in its interpretation of the will and was constructively fraudulent as to Mrs. Kennard, therefore *it was the duty of the Federal Circuit Court of Appeals in the instant McIntosh case to apply said state law and to reach a similar conclusion as between Mrs. McIntosh and Mrs. Wiggins,* although vital features of the two suits differed.

(3) *The complete fallacy of Petitioner's said fundamental contention appears from the following facts—indisputable upon the printed records*:

In neither Mrs. McIntosh's first Federal suit nor in her instant suit, against Mrs. Wiggins, did the decision in favor of Mrs. Wiggins *rest at all* upon a ruling that the disputed paragraph in the will construction decree *was right*, i. e., was *a correct interpretation of the will.* In neither suit did the Federal court attempt to interpret the will by deciding whether the disputed paragraph of said decree was right or wrong in such interpretation.

In each case the decision of the Federal Court rested upon the conclusion and ruling that *no matter whether the disputed paragraph of the will construction decree had been right or wrong in its interpretation of the will, Mrs. McIntosh was estopped by the doctrine of res judicata and because of her own conduct, to deny that said disputed paragraph was right.*

The opinion (not officially reported) of the District Court (Hon. C. B. Faris, Judge) in Mrs. McIntosh's first Federal suit (*Perry v. Wiggins*), said (Phys. Ex. p. *532):

> "Without further, I am of opinion that the defense of res adjudicata must be sustained. And this view obviously renders a consideration of the will, and of the clauses therein in dispute unnecessary to a decision here."

And the "Findings and Judgment" of said District Court entered February 20, 1931, stated (Phys. Ex. p. *538):

> "(17) That the premises considered, this Court holds and adjudges: that as between the parties hereto, the said decree of the Circuit Court, City of St. Louis, entered on June 22, 1923, construing the will of said John E. Liggett was and is res adjudicata and the plaintiff herein, Mary Lois K. Perry, was and

is bound and concluded thereby in this instant suit; * * *."

On the appeal by Mrs. McIntosh from said judgment, it was affirmed on August 25, 1931, by the United States Circuit Court of Appeals (Eighth Circuit) on a point of procedure, but the opinion of said Circuit Court of Appeals said (Phys. Ex. p. *552; *Perry v. Wiggins*, 57 F. 2d 622, at 625):

> "In this connection we wish to state that this holding of the court results in no prejudice to the appellant, as we have carefully examined the entire record, and are of the view that on the merits the judgment should be affirmed."

In Mrs. McIntosh's second (the instant) suit against Mrs. Wiggins, filed March 31, 1931 (R. 173), the District Court (Hon. Charles B. Davis, Judge) included in his "Special Findings of Fact and Conclusions of Law, etc.," on November 27, 1939, the following (R. 179):

> "The Court deems it unnecessary because of other Findings and Conclusions herein, to make any Findings or Conclusions upon the issue whether or not the disputed paragraph of the will construction decree is in harmony with the terms of the will and the intent of the testator."

Said "Conclusions of Law," without attempting to construe the Liggett will, held (R. 194): That the will construction decree was and is conclusive as res adjudicata between Mrs. McIntosh and Mrs. Wiggins as to the intent of testator, etc.; and that said judgment of the District Court in Mrs. McIntosh's said first Federal suit against Mrs. Wiggins was also res adjudicata in said second suit as to the title controversy and other points common to both of said suits (R. 195-196).

In said "Findings of Fact and Conclusions of Law," the

District Court did not attempt to interpret the disputed paragraph of the will.

On the appeal of Mrs. McIntosh from the decree in her said second (or instant) suit against Mrs. Wiggins, the Circuit Court of Appeals again decided in favor of Mrs. Wiggins, the same title controversy between Mrs. McIntosh and Mrs. Wiggins, on the ground of estoppel by the two former judgments and by applying the doctrine of res judicata, i. e., the estoppel of the will construction decree, and the later estoppel of the judgment in Mrs. McIntosh's first Federal suit (*McIntosh v. Wiggins*, 123 F. (2d), at 320-321).

In each of said Federal suits the estoppel was held to be a bar against Mrs. McIntosh's claim of title, no matter whether the disputed paragraph of the will construction decree was right or wrong in its interpretation of the will.

The opinion of the District Court in *Perry v. Wiggins* (Phys. Ex. p. *530) said and held:

> "It is obvious that if the matter complained of is res adjudicata, it will not aid plaintiff, even though it be true that the State Circuit and Supreme Courts were in error in the interpretation which they put on the will and on the disputed clause then, and now here in dispute."

That the decision of the Circuit Court of Appeals in Mrs. McIntosh's second (or instant) Federal suit is to the same effect, see *McIntosh v. Wiggins*, 123 F. (2d), at 320-321, paragraphs "2-6."

The decision of the *Kennard* case (in her favor), by the Supreme Court of Missouri, was based upon the combination of two rulings, viz.: *(first)* that the disputed paragraph in the will construction decree had not correctly interpreted the will; and *(second)* that the presence of said paragraph in said decree had been caused by an unauthor-

ized and invalid act of the attorney for her guardian ad litem in contending (partly on her behalf) for the same interpretation of the disputed paragraph of the will that he included in his draft for decree, and which the state circuit court adopted as the disputed paragraph of said decree entered of record. Therefore, said modified opinion decided that a constructive fraud upon Mrs. Kennard had resulted, though without any actual fraud (R. 368-370). In neither of the *McIntosh* cases were there any such rulings.

Absent either of said basic rulings, the decision could not have been for Mrs. Kennard. Said modified opinion states (R. 360):

> "It is contended that the construction given in the challenged paragraph of the decree is the correct construction. If so, there has been much ado about nothing."

Obviously, if said paragraph of the will construction decree was a correct interpretation of the will, Mrs. Kennard was not prejudiced by it, even though she was a minor defendant and though the attorney representing her interests was held to have exceeded his lawful authority by making the affirmative defense for her that had, through its adoption by the state circuit court, become the disputed paragraph in the decree.

It is equally obvious, that because Mrs. McIntosh, by her own conduct in the will construction suit, estopped herself from contending in her two Federal suits against Mrs. Wiggins that the disputed paragraph in the will construction decree was not the correct interpretation of the will, *the effect upon her is necessarily the same as though the disputed paragraph of the will construction decree had been held by the state supreme court to be a correct interpretation of the will.*

But Mrs. McIntosh brought this effect upon herself. No one else, certainly not Mrs. Wiggins, was responsible for it. Mrs. Wiggins and her two sisters (including the mother of Mrs. McIntosh) did all they could have reasonably been expected to do, in order to inform Mrs. McIntosh about the will construction suit. They caused her to be served with a copy of the summons and of their petition, which warned her (Phys. Ex. p. *185) that "contingent interests" under the Liggett will were to be adjudicated, and that the daughters were claiming to own fee titles (Phys. Ex. p. *197-198), a contention that was in complete hostility to the existence of any life estates or contingent remainders.

If Mrs. McIntosh had been reasonably diligent in the will construction suit to protect her contingent prospective interest in the trust estate she could have made in the state circuit and supreme courts and in the will construction suit the same contentions about the intent of the will, and about claimed frauds alleged to have been committed in each of said courts, that she and Mrs. Kennard have been asserting in several other futile suits ever since Mrs. McIntosh filed her first Federal suit against Mrs. Wiggins.

But she made no such effort. She did not appear nor file an answer in the state circuit court; nor did she appear or make any contention in the state supreme court in the will construction suit. From the June Term, 1920, when the will construction suit was filed, until June 19, 1929, when her first Federal suit was filed, she stood mute, although the will construction decree had been entered on June 22, 1923, and affirmed on March 16, 1925 (Phys. Ex. p. 113).

Because she thus "stood mute" and allowed the will construction decree to be entered and affirmed, and the affirmance to become final, the Federal District Court (Hon. C. B. Faris) held (Phys. Ex. pp. *530-531), under the doctrine of

res judicata, that she was estopped to claim that she had become the owner in fee, upon the death of her mother Mrs. Kilpatrick, of the same undivided one-twelfth interest in the trust real estate for which she sued in both her Federal suits.

The Circuit Court of Appeals, in its opinion in the instant case (*McIntosh v. Wiggins*, 123 F. [2d] 317, at page 322) held that:

> "Her own negligence in having failed to appear and defend her rights in that suit was enough to prevent the court below from granting her the relief which she seeks."

(4) *The doctrine of res judicata, applied in both of said Federal suits, was the rule firmly established in both this court and in the Supreme Court of Missouri, and applicable to suits between the same parties, involving the same dispute, and concerning the same, or a part of the same, property. Therefore, in applying it in the instant McIntosh case the Circuit Court of Appeals did not decide a point of law contrary to the state law on the same subject.*

The doctrine in this Court:

"A judgment rendered on the merits is conclusive as to all matters which were decided and as to all matters *which might have been decided;*" (citing cases—123 F. 2d 316, at 320-321).

A frequently cited decision of this Court on this doctrine, is *Cromwell v. County of Sac*, 4 Otto (94 U. S.) 351, at 353 (24 L. R. 195, at 198), where the Court said:

> "The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery *or defense* actually presented in the action, but also as to every ground *which might have been presented*, is strictly accurate, when applied to the demand or claim in controversy."

The doctrine in the State Court:

The same doctrine has long obtained in the Supreme Court of Missouri. In *Cordia v. Matthes*, 344 Mo. 1059, at 1062, 130 S. W. (2d) 597, at 598, the Court quoted with approval, the following statement of it:

> [34 C. J., §1236] "(3) *Matters Which Might Have Been Adjudicated.* A judgment on the merits, rendered in a former suit between the same parties or their privies, on the same cause of action, by a court of competent jurisdiction, operates as an estoppel not only as to every matter which was offered and received to sustain or *defeat* the claim, *but as to every other matter which might with propriety have been litigated and determined in that action.*"

In *Powell v. City of Joplin*, 335 Mo. 562, at 571, 73 S. W. (2d) 408, at 412, the court said:

> "It is a familiar Missouri rule that a judgment is conclusive not only as to questions which were raised but as to every question *which could have been raised.*"

To the same effect, see: *Consolidated School District v. Day*, 328 Mo. 1105, at 1113, 43 S. W. 2d 428, at 430; *Leslie v. Carter*, 268 Mo. 420, at 428, 187 S. W. 1196, at 1198; *City of St. Louis v. United Railways Co.*, 263 Mo. 387, at 425, 174 S. W. 78, at 84; *Summet v. City Realty Co.*, 208 Mo. 501, at 511-12, 106 S. W. 614, at 616; *Spratt v. Early*, 199 Mo. 491, at 501, 97 S. W. 925, at 928; *Donnell v. Wright*, 147 Mo. 639, at 647-648, 49 S. W. 874, at 875.

Therefore, in applying this doctrine to its decision of the instant *McIntosh* case, the Circuit Court of Appeals did not decide the case *contrary to this local law.*

Under this doctrine, if Mrs. McIntosh had been attentive instead of negligent, concerning her contingent interests in the trust estates, and had appeared by attorney in

the trial and appeal of the will construction suit, she could have opposed the contention about the meaning of the will that the attorney for Mrs. Kennard's guardian ad litem advocated; she would have known of his answer and trial brief. She would also have been shown the draft of decree; it was shown to and approved by all counsel who appeared in the case (*McIntosh v. Wiggins*, 123 F. 2d 316, at 319, par. 1). And if there had been fraud in its concoction, she could have prevented it in the circuit court. If she had appeared by counsel in the state supreme court in the appeal from the decree, she would have had a full opportunity there to call the attention of that court to the disputed paragraph of the decree and to oppose it, also to make any other desired contention concerning the intent of the will, or the charge of fraud in that Court. As an adult defendant, named in the petition, Mrs. McIntosh could therefore have prevented the existence of the same alleged factual grounds of fraud upon which she seeks in her instant suit against Mrs. Wiggins to have the disputed paragraph of the will construction decree held void.

Therefore, by standing mute she estopped herself from asserting in the instant suit, both of the grounds on which it is sought to be based.

Since it is clear and indisputable, that neither of the fundamental bases upon which the state supreme court decided the *Kennard* case, is available in the instant *McIntosh* Petition, as against Mrs. Wiggins, and that the Circuit Court of Appeals did not decide any question of local law contrary to established local doctrines, it is respectfully submitted that the pending Petition for a Writ should be denied.

II. The Petition for a Writ should be denied, because it is the second such petition filed by Mrs. McIntosh, requesting this Court to hear and adjudge as between her and Mrs. Wiggins, the same question of title that was involved in her first Petition for a Writ of Certiorari.

After the United States Circuit Court of Appeals, Eighth Circuit, had decided against Mrs. McIntosh (then Perry) her appeal from the judgment of the District Court in *Perry v. Wiggins,* supra, she filed with this Court her Petition for a Writ of Certiorari (No. 115) in said cause, which Petition was denied by this Court on October 10, 1932, and a rehearing was denied November 7, 1932 (287 U. S. 609, 77 L. Ed. 529).

The judgment of the District Court, which was affirmed in *Perry v. Wiggins,* 57 F. 2d 622, determined not only that the will construction decree of the Circuit Court, City of St. Louis, was res judicata as between Mrs. McIntosh and Mrs. Wiggins, but also determined that Mrs. Wiggins had a life estate in the same property which Mrs. McIntosh claimed to own, in her first Federal suit, and now claims to own in her second Federal suit. Referring to said judgment in *Perry v. Wiggins,* supra, the Circuit Court of Appeals in its recent opinion in *McIntosh v. Wiggins,* 123 F. 2d 316, at 321, said:

> "That judgment remains unmodified and in full force and effect. The appellee" (Mrs. Wiggins) "as against the appellant" (Mrs. McIntosh) "therefore holds a life interest in this property not only by virtue of the decree of the Circuit Court of the City of St. Louis which is attacked, but also by virtue of the judgment of the United States District Court in *Perry v. Wiggins which is not attacked.* Even if the judgment in *Perry v. Wiggins* was wrong, that is of no help to appellant, for a judgment which is wrong but unreversed and unmodified is just as effective as a judgment which is right. Thornton v. Carter, 8 Cir., 109 F. 2d 316, at 320, and cases cited."

So Mrs. McIntosh was held to be barred by two separate earlier judgments, one being the will construction decree, the other being said judgment in the first Federal suit.

The only new circumstance that has arisen since this Court denied Mrs. McIntosh's first Petition for a Writ, is the rendition by the Supreme Court of Missouri of its opinions (original and modified) in the *Kennard* case (R. 356-371).

Said modified opinion differed from the original opinion (R. 239-251) which it substituted, chiefly in that the modified opinion rested its decision on the conclusion that the peculiar circumstances (mentioned earlier herein), affecting Mrs. Kennard as a minor defendant, had worked a constructive fraud upon her, and that such *constructive* fraud constituted a sufficient basis for a judgment avoiding said disputed paragraph of the decree as between her and Mrs. Wiggins. Said modified opinion adhered to the ruling in the original opinion, that the disputed paragraph of the decree did not express a correct interpretation of the will.

Having shown above that Mrs. McIntosh was precluded by her own conduct in the will construction case, from making either of the contentions upon which said modified opinion rested its decision in the *Kennard* case, it is respectfully submitted that this pending and second effort by Mrs. McIntosh to persuade this Court to hear and determine her title controversy with Mrs. Wiggins, is not such as Rule 38, paragraph 5, of this Court indicates, would appeal to the discretion of this Court, to grant certiorari. Therefore the Petition should be denied.

III. The Petition for a Writ and its supporting brief err in assuming and suggesting that said modified opinion evidences the final decision of the state supreme court in the Kennard case.

A footnote to page 4 of the Petition states that on December 16, 1941, the Supreme Court of Missouri overruled a petition for rehearing in the Kennard case, but fails to state that said petition for rehearing related to the original (not to the modified) opinion of said state supreme court.

Said footnote also states that on December 26, 1941, Mrs. Wiggins filed a further petition for rehearing and a motion to transfer to the court en banc, and adds that:

> "At the time of writing this the Court has not acted upon the same, but *the Rules of that Court prohibit the filing of more than one petition for rehearing. Under the Constitution of Missouri, there is now no ground upon which the cause may be transferred to the Court in Banc.*"

The facts are: that by the same order in which the state Supreme Court modified its original opinion, it overruled Mrs. Wiggins' "Motion for Rehearing" (R. 252-272) and her "Motion to Modify or Withdraw" (R. 272-287) said original opinion, and also, of its own motion, modified said opinion (R. 355). Therefore the modified opinion (R. 356-371), which differed in vital respects from the original opinion, *became substituted for it, and now constitutes the opinion of said supreme court, Division One,* in the *Kennard* case.

Within rule time after the court had thus modified its original opinion, Mrs. Wiggins filed a "Motion for Rehearing" *addressed to said modified opinion* as then constituting the opinion of said court. At the same time she filed a "Motion to Transfer" the case on appeal to the Supreme Court of Missouri in Banc.

The applicable provision of the Constitution of Missouri in respect of such motions to transfer is found in Section 4 of the Amendment of 1890 to said Constitution (R. S. Mo. 1939, page 127c); it reads:

> "*Case transferred to court in banc, when.*—When the judges of a division are equally divided in opinion in a cause, or when a judge of a division dissents from the opinion therein, or *when a federal question is involved,* the cause, on the application of the losing party, shall be transferred to the court for its decision; *or when a division in which a cause is pending shall so order, the cause shall be transferred to the court for its decision.*"

Said "Motion to Transfer," filed by Mrs. Wiggins, was based upon two grounds: First, that certain rulings made in the modified opinion were of such great importance in the jurisprudence of Missouri and so revolutionary in character that Division One of the court should of its own motion exercise the discretion given it by the state Constitution by asking the entire court to share the responsibility of finally deciding said questions; and, second, that in case Division One should decide not to exercise said discretion by transferring the case upon said first ground, then the motion prayed for such transfer because the cause involved a federal question raised by Mrs. Wiggins at the first opportunity she had to do so because the federal question first arose by the filing of said modified opinion.

The Rules of the State Supreme Court contain no prohibition against the filing of a petition or motion for rehearing addressed to an opinion of a division of said court, which the court of its own motion had modified in respect of new and decisive rulings not contained in its original opinion. Said Rules do not seem to cover a situation of substantially the kind presented in that court in the instant *McIntosh* case.

In view of the foregoing facts and argument—the contentions and authorities cited in the pending Petition for a Writ and Supporting Brief in relation to all other points therein are irrelevant, and because of this conclusion it is deemed unnecessary to here analyze or discuss them.

CONCLUSION.

We submit that the writ should be denied for the following reasons:

(1) The Circuit Court of Appeals did not decide any question of local law concerning the will construction decree inconsistently with the decision of the Supreme Court of Missouri.

(2) The Petition is based entirely upon an erroneous assumption and contention, as shown by facts indisputable upon the records.

(3) The doctrine of res judicata being established law in both state and federal jurisdictions, the Circuit Court of Appeals, in applying it in the instant McIntosh case, did not decide a point of law contrary to the state law.

(4) An earlier petition by Mrs. McIntosh requesting this Court to hear and adjudge as between her and Mrs. Wiggins, the same question of title involved in this instant McIntosh case, was denied by this Court.

(5) The modified opinion of the state supreme court, treated by the Petition for a Writ as final, is not final because motions for rehearing and to transfer to the state supreme court in banc are still pending, undetermined at this time.

Respectfully submitted,

HARRY W. KROEGER,
DANIEL N. KIRBY,
of St. Louis, Missouri,
Counsel for Respondent.

FEB 19 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

MARY LOIS McINTOSH, Petitioner,

vs.

ELLA L. WIGGINS, Respondent.

No. 915.

PETITIONER'S REPLY BRIEF.

PAUL BAKEWELL, JR.,
Attorney for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

MARY LOIS McINTOSH, Petitioner,
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PETITIONER'S REPLY BRIEF.

A Fraud Upon the Supreme Court of Missouri Established by the Decision of That Court.

The fraud in obtaining the decree containing the paragraph was upon *the Supreme Court of Missouri itself* and in the very act of procuring the judgment.

The decision of that Court cites and quotes the "erroneous representations" made by counsel. Those "erroneous representations" were not made to any party, *but were made to the Court itself.*

That Court decided that such "erroneous representations" constituted a fraud, necessarily upon the Court itself. It also decided that the paragraph of the decree obtained thereby was a fraud "upon the *rights*" of the other remainderman.

The majority opinion below is in direct conflict with that decision by the Supreme Court of Missouri as to fraud.

"Where fraud in obtaining a judgment is established the estoppel of the judgment vanishes" (*Wagoner vs. Wagoner*, 287 Mo. 567, citing numerous decisions).

Where fraud has caused a judgment, it is immaterial whether it be actual or constructive fraud. Either vitiates the judgment and deprives it of any effect as an estoppel. *Mangold vs. Bacon*, 229 Mo., p. 487; *Clyce vs. Anderson*, 49 Mo. 37. See also *Johnson vs. Waters*, 111 U. S., p. 667; *Arrowsmith vs. Gleason*, 129 U. S., p. 100.

"Constructive fraud is simply a term applied to a great variety of transactions * * * which equity regards as wrong, to which *it attributes the same or similar effects*, as those which follow from *actual fraud*, and for which it grants *the same or similar relief* as that granted in case of real fraud. It covers different grades of fraud" (*Pomeroy*, 5th Ed., Sec. 922, Vol. 3, p. 626).

The Rights of This Petitioner Are Identical With the Rights of Mrs. Kennard.

Neither had any rights while the life tenants were alive. Upon the death of Mrs. Kilpatrick, Petitioner's mother, the rights of Petitioner and of Mrs. Kennard vested in them since they then became "the heirs of her body at the time of her death."

That was in 1928.

Erroneous Representations Were Made to the Supreme Court of Missouri by Counsel for Mrs. Wiggins, the Respondent, the Same Counsel Who Represents Her Here.

The Supreme Court of Missouri has said:

"* * * there were statements in the briefs, in effect, contrary to the construction in the challenged paragraph. * * *

* * * * * * *

"From Mr. Kirby's brief: 'In case a daughter should die during the trust period, then the remainder of the said subject-matter with which the testator was here dealing—the equitable estate during the rest of the trust—should go over to the heirs of the body of the deceased daughter, and in default of such heirs, then to the survivors of the daughters, again with remainders over to the heirs of their bodies'" (R., p. 248).

The Supreme Court of Missouri decided that such erroneous representations constituted a fraud and that the paragraph of the decree was a fraud upon the rights of the other remainderman (R., p. 370).

Such decision vitiated the paragraph of the decree and yet Respondent pleaded the said paragraph as an affirmative defense (R., p. 38) and the majority below sustained the paragraph as valid and binding and as res adjudicata, in direct conflict with the highest Court of Missouri. The majority below gave full effect to a State decree after the Supreme Court of that State had vitiated it by establishing fraud in its procurement.

The Distinction Between a Fraud Upon a Court and a Fraud Upon an Individual.

A fraud upon a *Court* vitiates the decree obtained thereby. Necessarily, the parties must then stand as if no such decree had ever existed.

A fraud upon a *party*, without any fraud upon a Court, may be a different matter.

But we are here dealing with a fraud upon the Courts of Missouri in obtaining a decree, as that fraud has been adjudged and established by the highest Court of Missouri.

If the Court below had followed the law of Missouri, or if it had given full faith and credit to the judgment of the

Supreme Court of Missouri, it would necessarily have accepted the judgment of that Court and, therefore, would have held that the decree had been vitiated by fraud upon the Court itself, which was a fraud upon the rights of this Petitioner and, therefore, that the decree was a nullity.

The further statements by the Court below were based upon its own decision that there had been no fraud.

But *subsequently* the Supreme Court of Missouri specifically found the facts and adjudged that the facts so found by it constituted a fraud.

Petitioner Here Was Not Negligent in the Will Construction Suit.

a) In that suit Mrs. Wiggins denied any claim to the Fowler portion. On the contrary, Mrs. Wiggins alleged that Mrs. Fowler owned that portion absolutely. The Court decided in 1923 that Mrs. Fowler had only an estate for her life and that the remainders over to arise on her death were contingent.

Neither Petitioner nor Respondent could have asserted any claim to the Fowler portion prior to the happening of the contingent events which would cause it to pass.

Petitioner had no right and could not acquire any right, interest, estate or title until the happening of the contingency specified; i. e., the death of her mother and Petitioner becoming an heir of her body. *That did not occur until 1928.*

This Court has decided:

> "Up to the moment of Henrietta Wright's [the life tenant's] death her children had *no* interest in the land except a bare *contingent* remainder *expectant* upon her death and their surviving her. *At her death it came to them* as an estate in fee in possession absolute" (*Wright vs. Blakeslee,* 101 U. S., p. 177).

Such is the law in Missouri. *Dickerson vs. Dickerson,* 211 Mo., p. 489; *Godman vs. Simmons,* 113 Mo., p. 131.

> "The *expectation* of a future event that *may* give an interest *is not* a thing which would justify a court of equity in entertaining a suit at the instance of a party *having that and nothing more*" (*Davis vs. Angel,* 4 DeG. & F. 524, 45 English Reprint 1287).
>
> "A remainder-man may have a decree to protect the estate from waste, and have it so secured by the trustee as to protect his estate in expectancy. The court will interfere under all needful circumstances to protect his rights, *but such cases do not come within the category of mere declaratory* decrees as to *future rights*" (*Cross vs. DeValle,* 1 Wallace, p. 15).

b) The absence of a defendant does not permit a fraud upon the Court, and where such a fraud has been established, the absence of a defendant is not negligence and may not be asserted by a party who committed such fraud.

c) Under the law of Missouri, a plea of negligence is not a valid defence to an action based upon fraud. *Overton vs. Overton,* 327 Mo. 530.

The Respondent Committed a Fraud Upon the Highest Court of Missouri and Caused a Legal Perversion.

Mrs. Wiggins was a plaintiff in the original will construction suit. The same counsel who represented her in that suit represents her in this suit.

Her bill in the will construction suit signed by that counsel stated the purpose of her suit was to give "full effect to the intent of the testator" (Phys. Ex., p. *202).

The Supreme Court of Missouri has established that her counsel, Mr. Kirby, stated in his brief to that Court that the testator intended that on the death of a daughter with-

out issue, her portion should go "then to the survivors of the daughters, again with remainders over to the heirs of their bodies" (R., p. 248).

The said Supreme Court has also established that he did not advise the Supreme Court that a paragraph of the decree was to the contrary (R., p. 369).

It also established that such erroneous representations were a fraud and were a fraud upon the rights of the other remainderman, whose rights were identical with those of Petitioner (R., p. 370).

The same counsel for Mrs. Wiggins in her answer here pleads as an affirmative defense (R., p. 338) the paragraph of the decree, which contradicts the intention of the testator, as stated by him to the Supreme Court.

The same counsel expressly avers that Mrs. Wiggins did not present that paragraph of the decree to the Supreme Court of Missouri because Mrs. Wiggins "did not desire to have the same reviewed or altered" (R., p. 333).

The result of such erroneous representations so made to the Supreme Court of Missouri by Respondent here was a legal perversion; to wit:

a) a suit to give full effect to the testator's intention;

b) an opinion of the Supreme Court, which stated that intention; and

c) a paragraph of the decree remaining on the record, which contradicted that intention.

With the express admission by the Respondent that she did not present said paragraph to the Supreme Court because she did not wish to have it reviewed, and with the majority opinion below giving to Respondent the full benefit of such paragraph, when pleaded by her as an

affirmative defense in a Court of Equity, we submit that this record constitutes a legal monstrosity.

We submit the case as being one without a precedent.

The Gravity of the Error of the Court Below Becomes Apparent by Considering the Accident of Possession.

If upon the death of her mother, Mary Lois McIntosh had acquired possession of this property, and if Mrs. Wiggins had sued upon said paragraph of said decree to obtain the property because of said decree, we submit that she could not have obtained the said property in any Court of Equity for one reason alone—the decree was unjust.

Here by a circumstance, upon the death of Mrs. Kilpatrick, Mrs. Wiggins, her sister, actually acquired possession of the property.

In a suit by her sister's child, Mrs. Wiggins pleads as an affirmative defense the unjust and fraudulent paragraph of the decree and the Court below sustains that defense, even after the Supreme Court of Missouri, which rendered the final judgment in the will construction suit, has established that such decree was obtained by a fraud upon that Court itself, and that it constituted a fraud upon the rights of the other remainderman.

Admitting that under the law of Missouri the property vested in Mary Lois McIntosh in 1928, the Court below, sitting in Equity, allows the Respondent to shield herself in the possession of that property by a decree, which the Supreme Court of Missouri said had been the result of fraud.

Respectfully Petitioner prays that this Court grant its writ of certiorari and that it consider and decide the questions presented by such petition, and particularly that in the interest of the "integrity of judicial action," this Court

determine whether a party may have any benefit in a Court of Equity from a decree, which perverts Justice and perverts the purpose of the suit in which it appears by defeating the intention of the testator.

Respectfully submitted,

PAUL BAKEWELL, JR.,
Attorney for Petitioner.

(22)

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FILED
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

MARY LOIS McINTOSH,
Petitioner,
vs.
ELLA L. WIGGINS,
Respondent.
No. 915.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit, In Equity.

PETITION FOR REHEARING.

PAUL BAKEWELL, JR.,
Attorney for Petitioner.

With Him on Petition:
JOHN E. CRAMER, JR.,
CLAUDE I. BAKEWELL.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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PETITION FOR REHEARING.

Respectfully Petitioner prays for a rehearing on her Petition for Writ of Certiorari.

This case presents questions never before decided by this Court:

WHAT FORCE AND EFFECT, AS RES ADJUDICATA, MAY A FEDERAL COURT GIVE TO AN ERRONEOUS PARAGRAPH OF A DECREE ENTERED BY A STATE CIRCUIT COURT IN A WILL CONSTRUCTION SUIT, WHICH PARAGRAPH FLATLY CONTRADICTS THE OPINION OF THE STATE SUPREME COURT ON APPEAL IN THE SAME CASE:

1) When on appeal the State Supreme Court states the intention correctly, but enters an order of affirmance

a) because the briefs of counsel stated the intention correctly, but did not advise the Court that the decree appealed from contradicted that intention;

b) because no point was made of the correctness of the paragraph of the decree of the State Circuit Court;

c) because the briefs of counsel had suggested that no such construction had been made; and

d) because "No judge, by reading the briefs in the will construction suit appeal, would even suspect such a construction as that contained in the challenged paragraph of the decree."

2) When on appeal the State Supreme Court has stated the intention correctly, but enters an order of affirmance, and later, in a separate suit, holds that under the facts, *fraud* entered into the procurement of the final judgment in the will construction suit.

3) When on appeal, the State Supreme Court states the intention correctly, but affirms a decree, which is to the contrary, and later in a separate suit, holds that the pleadings and proof amply support a judgment declaring void the erroneous paragraph of the decree on the grounds of accident, mistake or fraud.

THE FACTS UNDERLYING THE QUESTIONS PRESENTED.

Petitioner, Mary Lois McIntosh, and Elizabeth Liggett Kennard, the successful Missouri Court Plaintiff, have identical rights under the will of John E. Liggett. They were contingent remaindermen under his will, and on the death of a life tenant (Dolly L. Kilpatrick, Petitioner's mother) property of the value of many hundreds of thousands of dollars *vested* in each of them, as the *heirs of her body.*

The Supreme Court of Missouri has so ruled (Opinion in *Kennard vs. Wiggins,* R., p. 361).

The Court below has accepted that ruling (123 Fed. [2d] 316, p. 322; R., p. 298).

Nevertheless, Respondent, Ella L. Wiggins, in violation of her father's will, has claimed and held the property which vested under the will, in equal shares in Petitioner and in Mrs. Kennard.

Mrs. Kennard, in the Missouri Courts, *has* recovered judgment for her share.

Petitioner, whose lot is cast in the Federal Courts solely because of diversity of citizenship, *has not* been able, thus far, to recover her share from Ella L. Wiggins—the share which vested in Petitioner under her grandfather's will.

Yet the evidence is the same in each case.

This unique situation is caused by the action of the Court below in sustaining a plea of *res adjudicata,* which is admittedly without precedent.

The plea of *res adjudicata* is based on the following facts:

In 1923 Respondent and her two sisters brought suit in the Circuit Court of the City of St. Louis to construe the will of their father, John E. Liggett. They claimed to be

the owners of absolute estates as distinguished from life estates. Their claims were denied and they appealed to the Supreme Court of Missouri. That Court then said:

> "The trial court held that the will created life estates only in the three daughters, with contingent remainders over in their bodily heirs. *and entered a decree accordingly.* From *that decree* the daughters duly appealed the case to this court, and the single question they now present is whether *that ruling* is correct, or not" (271 S. W., p. 821; Phys. Ex., p. 84). (Emphasis throughout is ours.)

But, the trial Court had NOT "entered a decree accordingly". The 57-page decree contained a paragraph which is "untenable" under "all the rules of construction" of wills. It is the paragraph under which the Respondent claims and which she pleads as *res adjudicata.*

Notwithstanding the presence of this unjust paragraph in the decree, the Supreme Court of Missouri *entered an order of affirmance.* It did so, as the Court now holds in the *Kennard* case:

Because:

> "* * * there were statements in the briefs, in effect, *contrary* to the construction in the challenged paragraph";

Because:

> "No judge, by reading the briefs in the will construction suit appeal, *would even suspect* such a construction as that contained in the challenged paragraph of the decree";

Because:

> "No point was made as to the correctness of the construction and [because] *the briefs would suggest that no such construction was made* * * *."

In fact, the opinion of the Supreme Court of Missouri in the will construction case *stated the intention of the testator correctly*[1] before entering its order of affirmance.

Under these circumstances, is the unjust paragraph in the will construction *decree* entitled to the dignity of *res adjudicata?*

It is established in Missouri that its Supreme Court, on appeal, tries an Equity case *de novo* and renders the final judgment.

The majority opinion below sustains as *res adjudicata* the *decree* of the trial Court, not the *judgment* of the State Supreme Court.

This record, therefore, presents an important question of *res adjudicata.* The question above stated is a question of first impression on which this Court should rule for the benefit of Bench and Bar.

This question, in its three aspects, is not answered by the majority opinion below. The majority opinion below upholds the erroneous paragraph in the decree of the State Court as *res adjudicata* on the ground that a defendant is bound by a decree which is wrong as well as by a decree which is right. It cites cases which support that salutary general rule. But it does not consider the differentiating facts presented by this record.

A determination of this question does not depend upon

---

[1] The Supreme Court of Missouri said in its opinion that if a daughter should die without issue, the testator intended her portion to go

> "to the survivors of my daughters in equal portions for life, with remainders over, as to such portion, to the heirs of the bodies of such as shall die leaving issue of their bodies absolutely, share and share alike, per stirpes" (271 S. W., p. 827; Phys. Ex., p. 104).

To the contrary, the unjust paragraph in the decree provides that the share of a daughter dying without issue should go to

> "each of said [surviving] sisters for life, and on the death of either of them, the undivided one half interest therein of the one so dying shall go to and vest in the survivor for her life, and upon her death the whole of said property shall go to and vest absolutely in the then surviving issue of said Ella L. Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita" (R., p. 358).

whether Petitioner was an adult or a minor at the time of the will construction suit. It involves merely the right of Respondent to assert any claim under the erroneous paragraph of the decree of the State Circuit Court, as opposed to the opinion of the State Supreme Court in the same case and as opposed to a subsequent decision by the State Supreme Court that said paragraph was wrong and that fraud, accident or mistake had procured an order of affirmance in the original suit.

We ask this Court to grant a Writ of Certiorari and to answer the foregoing question.

THE SAME RELIEF AWARDED TO MRS. KENNARD IN THE MISSOURI COURTS SHOULD BE AWARDED TO PETITIONER IN THE FEDERAL COURTS. THE PARTIES ARE SIMILARLY SITUATED AND ONLY MATTERS OF MISSOURI LAW ARE INVOLVED.

Our Petition charges that the decision below of the Eighth Circuit Court of Appeals conflicts, on matters of Missouri law, with the decision of the Supreme Court of Missouri in the companion case of *Kennard vs. Wiggins.*

Respondent denies that such conflict exists, asserting that the Plaintiff in the Federal Court and the Plaintiff in the State Court are "differently situated" (Respondent's Brief, p. 13).

If such conflict *does* exist the doctrine of *Erie Railroad vs. Tompkins* has been violated. And, admittedly, if the parties in the Federal and State Courts are similarly situated, such indefensible conflict *does* exist and will be righted by this Court to preserve the orderly administration of Justice in Federal and State Courts.

We, therefore, direct inquiry to the specific question:

Are the parties in the Federal case of *McIntosh vs.*

Wiggins (the case below) and the parties in the Missouri case of *Kennard vs. Wiggins* (R., pp. 356-371) differently or similarly situated?

In the so-called "will construction suit" brought by Respondent, Mrs. Wiggins, and her two sisters in 1923 in the Missouri Court, both Petitioner and Mrs. Kennard as well as other then prospective contingent remaindermen were joined as defendants.

Petitioner was then an adult; she did not appear and filed no answer.

Mrs. Kennard was a minor and necessarily she appeared by a guardian ad litem, who filed an answer for her.

In 1929 Petitioner brought an action at law in the Federal Court against Mrs. Wiggins, the Respondent here, to determine title to part of the property—the real estate—here in dispute. The District Court held that the decree in the 1923 will construction suit was *res adjudicata* of the issues then before the Court (*McIntosh vs. Wiggins,* Phys. Ex., p. *538, affirmed on a point of procedure, 57 Fed. [2d] 622).

The status of Petitioner and Mrs. Kennard, and the evidence introduced in each of their cases, is identical with the exception of the two aforesaid circumstances, to-wit: Petitioner's majority at the time of the will construction suit, and Petitioner's effort to have her title to the real estate determined in the action at law in the Federal Court.

Do those circumstances give Respondent a legal right to hold Petitioner's property in violation of the terms of the testator's will? They do, in the opinion of the majority below. They do not, in the opinion of the dissenting judge below.

The Fact That Petitioner Was an Adult Defaulting Defendant in the Will Construction Suit Does Not Preclude Her From Relief.

The Court below erred in holding that since Petitioner was an adult, her "*negligence in having failed to appear and defend her rights in the* [*will construction*] *suit was enough to prevent the* [*District Court*] *from granting her the relief which she seeks.*"

The majority opinion below completely overlooks the fact that at the time of the will construction suit in 1923, Petitioner had no "rights" and had no standing in Court to ask for any relief.

She was then merely a prospective contingent remainderman.

It is well established in Missouri, and elsewhere, that a contingent remainderman, as such, has no justiciable rights. May Petitioner, then, be charged with negligence in having not done the legally impossible?

It must be remembered that the unjust paragraph in the will construction decree was "caused" by "the action of the guardian ad litem, by his attorney, in going beyond any authority he had * * *" (Opinion in *Kennard vs. Wiggins*, R., p. 370).

Petitioner did not cause the unjust paragraph. She merely stood by while her mother and her aunts were asking for a judicial determination of the single question as to whether they took absolute estates or life estates under the will. The decree correctly provided that they took life estates only but incorrectly went further than that in providing, in the unjust paragraph, that the vesting in fee of the share of a daughter dying without issue should be postponed until the death of the last surviving daughter. This unjust paragraph went beyond the issues raised by the Petition; (to borrow the language of the minority

opinion below, R., p. 300) it "crept into the decree solely because of the request contained in the guardian ad litem's pleading * * *." It had no "other motivated basis than as a response to the guardian ad litem's pleading" (R., p. 301). That pleading, as the Supreme Court of Missouri now expressly holds, was "in excess of his lawful authority and by mistake of his counsel."

The majority opinion below does not assert that Petitioner *caused* the unjust paragraph of the decree; it says she was negligent in doing "nothing to prevent" it.

Was Petitioner's non-appearance in the will construction suit either the proximate or remote cause of the unjust paragraph? Could she have known that issues entirely foreign to the claims of the plaintiffs would be prematurely and wrongly covered by an unjust paragraph in the decree? To charge Petitioner with negligence in having failed to appear in the will construction suit is to credit her with powers not possessed by mortal man.

We submit that Petitioner was not negligent in failing to foresee the entry of the unlawful, unjust and premature paragraph in the decree.

We recognize, of course, that a defaulting defendant is bound by a judgment which is wrong, as well as by a judgment which is right. But a wrong judgment is not binding and is not res adjudicata (a) if it is beyond the issues raised by the petition, or (b) if it exceeds the jurisdiction of the Court, or (c) if fraud has entered into its procurement.

The unjust paragraph under which Respondent, Mrs. Wiggins, claims is admittedly wrong.

a) And further, we submit that the unjust paragraph is invalid and is not binding upon Petitioner, a defaulting defendant, *because it went beyond the issues raised by the petition* in the will construction suit. This question was

not even touched upon by the Court below and has not been specifically considered or decided by the Supreme Court of Missouri.

It is singularly a question of Missouri law, but it should have been decided by the Court below. Clearly, there is an hiatus in the decision below because of the failure of the Court below to consider or decide the question.

b) Further, we submit that the trial Court had no *power* to determine the devolution of the future, contingent interests, even if such questions had been put in issue by the petition. The law of Missouri clearly supports our contention on this point (see Brief in Support of our Petition for Certiorari, p. 40). But this question has not been considered or decided by either the Court below or by the Supreme Court of Missouri in the *Kennard* case. The Court below erred, however, in tacitly assuming, without deciding, that the Missouri trial Court had the power to enter the unjust paragraph, which, of course, dealt exclusively with the future devolution of contingent remainders.

Such assumption (viz., that the trial Court had the *power* to enter the unjust paragraph) is a necessary support to the charge of negligence made against Petitioner. Such assumption is unwarranted and is contrary to the law of Missouri. Therefore, the charge of negligence is without basis or support.

For these reasons alone we think (as does the dissenting judge below) that the Court erred in denying relief to Petitioner and in permitting Respondent to hold property in violation of the testator's will.

c) But there is another and controlling reason why this Court should review the action of the majority below. Its opinion states:

> "we shall accept the ruling of the Supreme Court of Missouri that the provision of the decree complained of by [Petitioner] was wrong, *but it is to be noted that that court does NOT hold that it was procured by fraud, accident or mistake, OR* that it is void *OR* is not binding upon adult defendants who were served with process in the will construction suit, but did not appear" (R., p. 298).

It is true that the Supreme Court of Missouri in the *Kennard* case does not *explicitly* hold that the unjust paragraph is void, and does not *explicitly* hold that it is not binding upon Petitioner, an adult defendant. In the *Kennard* case no such adult defendant was before the Court; the Court was not asked, and could not have been asked, to make an explicit ruling as to a party [Petitioner] who was not before the Court. The absence, therefore, of such an *explicit* ruling is not significant and is understandable.

But it is of tremendous significance that the majority below errs in holding that the Supreme Court of Missouri "does *not* hold that it [the unjust paragraph] was procured by fraud * * *."

Such holding is in direct conflict with the facts as now established by the Supreme Court of Missouri. The Supreme Court of Missouri in the *Kennard* case, in reference to what occurred in the will construction suit, *explicitly* holds:

> *"where fraud enters into the procurement of a judgment detrimental to a minor, such minor * * * has a remedy by suit in equity to set aside"* (R., p. 368).

This conflict between the decision of the Court below and the decision of the Missouri Court calls out for correction lest the doctrine of *Erie Railroad vs. Tompkins* be undermined, lest the Bar be confused and misled, lest the power of Equity be seriously limited.

Is Respondent (Mrs. Wiggins) in a position to assert that the parties are "differently situated"? May she assert that "where fraud enters into the procurement of a judgment detrimental" to an adult, such adult has *no* remedy? Will she, in Equity, be permitted to retain any of the benefits of a judgment procured by fraud? Are Courts to be instruments for the perpetuation of fraud and injustice?

We submit that the decision below is a blot upon the annals of American jurisprudence which this Court will remove.

We submit that this Court will not knowingly permit Mrs. Wiggins to hold any property in violation of the testator's will under a judgment procured by fraud.[1]

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1 The fraud was constructive, not intentional, although it is true that no one except Mrs. Wiggins or her sisters could have hoped to benefit by the unjust paragraph in the will construction decree. The opinion below overlooks this fact. The Supreme Court of Missouri in its opinion of December 16, 1941, in the *Kennard* case, explicitly said:

> "the challenged paragraph in the will construction suit, under the facts, amounted to a *constructive fraud* upon the rights of [Mrs. Kennard] a minor defendant in that suit. And by such fraud, we mean representations which cause injury to another, although the party making the representations did not intend to deceive" (citing cases here omitted).

This language, on the Court's own motion, has been deleted from the opinion at the request of the attorney who appeared for the guardian ad litem in the will construction suit. The reasons for his request were personal, as he now represents no party in the litigation. In lieu of this language, the Court has said:

> "the challenged paragraph in the will construction suit, under the facts, wrongfully deprived a minor defendant, who is now the present plaintiff, of the possession of the property and the income therefrom as claimed by her in the present cause."

Such change in the Court's language obviously does not militate against the conclusion that the erroneous statements of counsel in the will construction suit appeal amounted to a constructive fraud upon the Court, and does not alter the express holding of the Court that fraud entered into the procurement of the judgment.

(We advise this Court of such change in language of the opinion of the Supreme Court of Missouri in the *Kennard* case pursuant to a stipulation dated December 13, 1941 (R., p. 346). In the *Kennard* case the Supreme Court of Missouri overruled Mrs. Wiggins' first motion for rehearing on December 16, 1941; overruled her second motion for rehearing and her first motion to transfer to the Court en Banc on February 26, 1942; Mrs. Wiggins filed her third motion for rehearing and her second motion to

Petitioner's Effort to Have the Title to Real Estate Determined Under the Will, and the Judgment in the Federal Court Action at Law in Perry vs. Wiggins, Which Refused to Determine Title Under the Will, Does Not Preclude Her From Relief in Equity.

a) Because the issues here of fraud, accident or mistake were not, and could not have been raised in *Perry vs. Wiggins;* and

b) Because, since the decision in *Perry vs. Wiggins,* the Supreme Court of Missouri has invalidated the very judgment which *Perry vs. Wiggins* relied upon as *res adjudicata.*

The majority opinion below asserts that:

"The decision of the Supreme Court of Missouri [in the *Kennard* case] cannot, in any event, affect, in

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transfer to the Court en Banc on March 7, 1942, and the same have not yet been ruled upon.)

The full force of the opinion of the Supreme Court of Missouri in the *Kennard* case can be appreciated only by reading the same in its entirety. But we point out that the Missouri Court has said in the *Kennard* opinion:

"This is an action in separate counts to have declared void, on the alleged ground of fraud, accident or mistake a paragraph in a decree construing a will * * *."

It then holds that the paragraph is not tenable, that "No word juggling as to *remainders,* etc., can, in reason, reach such result."

It then observes:

"* * * there were statements in the briefs, in effect, *contrary* to the construction in the challenged paragraph."

"No judge, by reading the briefs in the will construction suit appeal, *would even suspect* such a construction as that contained in the challenged paragraph of the decree."

"*No point* was made as to the correctness of the construction and *the briefs would suggest that no such construction was made,* * * *."

"Defendant [Mrs. Wiggins], however, says that no fraud, accident or mistake was pleaded or proved that would support the judgment below * * *."

But

"* * * the petition alleged that on appeal in the will construction suit counsel did not advise this court as to the disputed paragraph in the decree, but on the contrary 'the briefs of all counsel' stated 'the intention of the testator to be that if a daughter should die without issue, her one-third (⅓) should pass in equal portions to her surviving sisters for life with remainders over to the heirs of their respective bodies.'

"We think that the pleadings and proof amply support the judgment below, * * *" (Opinion of the Supreme Court of Missouri in *Kennard vs. Wiggins,* R., pp. 356, 363, 364, 366, 369, 370).

any way the binding force and effect of the judgment of the United States District Court in Perry v. Wiggins * * *'' (citing *Deposit Bank vs. Frankfort,* 191 U. S. 499).

a) The judgment at law in *Perry vs. Wiggins* (Phys. Ex., p. *538) sustained the plea that the decree in the will construction suit was *res adjudicata.* The plaintiff (Mrs. McIntosh) in *Perry vs. Wiggins* did not charge, and there could not have charged, that there had been fraud in the procurement of the judgment in the will construction suit. *Perry vs. Wiggins* was an action at law; no issue as to fraud was made or ruled on; the broad powers of Equity were not invoked, and could not have been invoked; they *are* invoked here.

b) The judgment in the will construction suit relied upon as *res adjudicata* in the Federal Court case of *Perry vs. Wiggins,* has now been invalidated because it was procured by fraud.

To give effect to the judgment in *Perry vs. Wiggins* gives effect to the invalid judgment on which it relies. Is Equity powerless in such circumstances? Is it forced to give effect to a judgment procured by fraud merely because that judgment, prior to its invalidation, had been sustained as *res adjudicata* in another Court?

We think that the powers of Equity are not so limited by *Deposit Bank vs. Frankfort, 191 U. S. 499.* We think that the majority opinion below has extended the doctrine of the *Frankfort* case beyond what was intended by that decision, and that the situation calls for an exercise of the supervisory powers of this Court.

Earnestly we contend that Mrs. Kennard, in the Missouri Courts, and Petitioner, in the Courts below, are not

"differently situated" so as to justify denial of relief to Petitioner. It is our conviction that Equity will not permit Respondent to retain any benefits of a judgment procured by fraud, and to retain those benefits in violation of the testator's last will.

Respectfully submitted,

PAUL BAKEWELL, JR.,
Attorney for Petitioner.

I hereby certify that the foregoing Petition for Rehearing, in my opinion, is well founded, and entitled to the favorable consideration of the Court, and that it is not filed for the purpose of delay.

Paul Bakewell, Jr.,
Attorney for Petitioner.